

***United States Court of Appeals
for the Second Circuit***



APPENDIX

ORIGINAL

77-1446

**United States Court of Appeals
For the Second Circuit**

B
P/s

UNITED STATES OF AMERICA,

Appellee,

v.

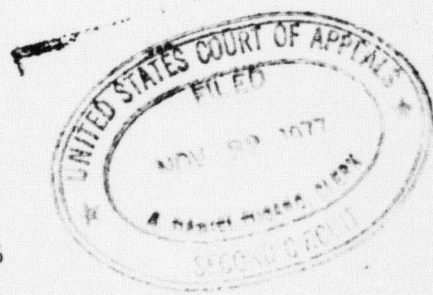
GILBERT FRIEDMAN,

Appellant.

*On Appeal From The United States District Court
For The Southern District Of New York*

APPELLANT'S APPENDIX

STEPHEN DAVID FINK
Attorney for Appellant
125-20 Queens Boulevard
Kew Gardens, N.Y. 11415
(212) 261-5550



PAGINATION AS IN ORIGINAL COPY

TABLE OF CONTENTS

	Page
Docket Entries.....	A-1 to A-3
Complaint and Magistrate's Papers.....	A-4 to A-10
Indictment.....	A-11 to A-14
Notice of Readiness for trial.....	A-15
Transcript of proceedings, dated: July 27, 1976.....	A-62 to A-67
Transcript of proceedings, dated: September 17, 1976.....	A-68 to A-74
Judgment and Commitment.....	A-16 to A-17
Defendant's Notice of Motion with Memo Endorsed, dated: October 12, 1976.....	A-18 to A-23
Defendant's Notice of Motion with Memo Endorsed, dated: October 29, 1976.....	A-75 to A-99
Notice of Appeal from orders dated December 3, 1976, and December 6, 1976.....	A-24
Memo Endorsed on unfiled letter from defendant, dated: December 16, 1976.....	A-25 to A-28
Notice of Appeal from order denying reduct- ion of sentence, dated: December 12, 1976..	A-29
Defendant's Notice of Motion to dismiss dated: March 3, 1977.....	A-30 to A-36
Defendant's Memorandum of law in support of motion to dismiss.....	A-37 to A-99

	Page
Government's Memorandum of law in opposition to motion to dismiss.....	A-100 to A-135
Transcript of proceedings, dated: April 19, 1977.....	A-136 to A-147
Order and Opinion of Judge Duffy denying defendant's motion.....	A-148 to A-163
Notice of Appeal from order denying motion, dated: June 1, 1977.....	A-164
Exhibits.....	A-165
Defendant's Exhibit 1, Affidavit.....	A-165 to A-168

Felony ☒ JUDGE/MAGISTRATE Assigned Trial 0860
 Minor Offense ☐ 0208 01 Disposition
 District Office

U.S. vs. 01 - FRIEDMAN, GILBERT ANDREW A-1
 a/k/a "Chris"
 DOCKET ENTRIES

U.S. CODE SECTION 21:846
 21:812,841

OFFENSES
 Consp. to viol. Narco. Laws.
 Distr. & possess. of Barbituric Acid III.

COUNTS
 1
 2-3
 5

U.S. Attorney or Asst.
 Harry C. Batchelder, Jr.
 791-0071

Defense: ☐ CJA, ☐ Ret, ☐ Waived, ☐ Self, ☐ None, ☐ Other, ☐ PO, ☐ CD

MAGR. CASE NO.
 Bail ☐
 Denied ☒
 AMT (000)
 \$ 5,
 12/16/76
 Bail Not Made ☐
 Bail Still Changed (See Docket)

ARREST 12-16-75
 U.S. Custody or Date Design'd
 High Risk Defn. & ☐
 Prosecution Deferred ☐

INDICTMENT 4-29-76
 Information ☐
 Waived ☐
 Superseding ☐
 Indict/Info ☐

ARRAIGNMENT
 Trial Set For 8-9-76
 1st Plea 5-6-76
 Final Plea
 Not Guilty ☒
 Not Guilty ☐
 Not Guilty ☐
 Guilty ☐
 Guilty ☐

TRIAL
 Voir Dire ☐
 Trial Began ☐
 Trial Ended ☐

Disposition 7-27-76
 Convicted ☐
 Acquitted ☐
 Dismissed ☐
 Noted/CD ☐

Search Warrant	Issued	DATE	INITIAL/No.	INITIAL APPEARANCE 12/16/75	INITIAL/No. CJH-080E	OUTCOME
Return				PRELIMINARY EXAMINATION OR REMOVAL HEARING	Date Scheduled 1/5/76	Dismissed ☐ Held for District CJ ☐ Held to Answer to U.S. ☐ AT: ☐ Magistrate's Initials
Summons	Issued			Waived ☐ Not Waived ☒	Intervening Indictment ☐	
Arrest Warrant	Served			Type No.	INITIAL/No.	
COMPLAINT		12/16/75	CJH-080E			
OFFENSE (In Complaint)	21 USC 812,841(a)(1),841(b)(1)(A) and 846 - NARCOTICS					

Show last names and suffix numbers of other defendants on same indictment/Information

02-CASSBERG
 DATE 12/16/75
 PROCEEDINGS
 Complaint filed, represented by Allan Passin, Esq., 521 - 5th Ave., N.Y.
 Defendant released on bail, address, 301 E. 48th St., N.Y.
 4/29/76 Indictment filed, 76 Cr. 441
 5-6-76 Deft. (w/o Atty.) Court directs a not guilty plea. Case assigned to Judge Duffy. 10 days for Motions. Bail continued as fixed in the amount of \$5,000. P.R.B.
 5-7-76 Filed complaint dtd. 12-16-75
 5-11-76 Filed notice of readiness for trial.
 7-14-76 PRE-TRIAL CONFERENCE HELD & CONCLUDED. Case Set for Trial AUGUST 9, 1976 10 AM DUFFY, J
 7-23-76 Deft(Atty.present) Pleasing ADJ to 7-27-76.BAIL CONTINUED. DUFFY, J
 7-27-76 Atty.present..Deft withdraws plea of N.G. and PLEADS GUILTY to Ct.1 only P.S.I. report ordered..Sent. adjd to 9-17-76 Bail cont'd...Duffy, J.

Wyatt, J.

553

See over

DATE	76Cr.441 KTD	IV. PROCEEDINGS (continued)	Page 2 A-2	V. EXCLUDABLE DELAY			
				(a)	(b)	(c)	(d)
11-17-76	Filed Judgment (Atty. Allan Passin, present) The deft is committed for a period of THREE YEARS on count 1. Pursuant to the provisions of Title 21, U.S. Code, Section 841, the deft is placed on special parole for a term of THREE YEARS, to commence upon expiration of prison sentence. Cts. 2, 3 & 5 are dismissed by the Court on defense counsel's motion, no objection by the Govt. Deft is continued on present bail until 10-1-76 at 10:30 a.m. at which time deft is to surrender to the U.S. Marshal in room 506 for service of sentence. Duffy, J... Ent. 9-20-76....						
12-12-76	Filed Deft's Affidavit and Notice of Motion for an order postponing date of deft to surrender from 10-1-76 to 10-15-76. RET: 10-1-76.						
12-12-76	Filed Memo-Endorsed (on Notice of Motion filed 10-12-76) Motion Granted. So Ordered. DUFFY, J m-n - Notified US Atty.						
12-17-76	Filed notice of writ motion for an order suspending the sentence imposed.. With memo endorsed.. Upon consideration of the affdvt. of the deft and the exhibits thereto, the motion is denied... Duffy, J... m/n						
7-27-76	Filed transcript of record of proceedings, dated 7-27-76						
9-17-76	Filed transcript of record of proceedings, dated 9-17-76						
11-29-76	Filed memo endorsed on letter dated 11-29-76... The relief requested is not within the jurisdiction of this Court. Accordingly, the application is denied.... Duffy, J. Copy mailed to deft.....						
11-24-76	Filed memo endorsed on letter dated 11-24-76.. The annexed is considered as a motion to reduce*** As such it is denied..... Duffy, J.... copy mailed deft.						
12-3-76	Filed notice of appeal from order entered on Dec. 3 and 6, 1976. Copy given to AUSA and mailed to defts atty. for deft....						
12-7-76	Filed Memo-Endorsed on letter dated 12-7-76-considered a motion..... Motion to reduce sentence under Rule 35 FRCP is denied. So Ordered. DUFFY, J copy mailed.						
12-23-76	Filed Deft's Notice of Appeal to USCA 2nd Circuit from order which denied reduction of sentence. mailed copy to atty. for deft. Harry Batchelder, 1 St. Andrews Plaza, NYC 10007.						
1-14-77	Filed notice that the original record on appeal has been certified and transmitted to the U.S.C.A. this date....						
3-15-77	Filed Deft's Notice of Motion for an order vacating sentence and Motion for Post Conviction Relief under Rule 32(d) of Rules of Crim. Procedure etc. RET: 3-15-77.						
3-15-77	Filed Deft's Memorandum of Law						
4-1-77	Filed Govts memorandum of law in opposition to motion to withdraw guilty plea...						
4-1-77	Filed affdvt. of H.C. Batchelder, AUSA in response to motion to withdraw guilty plea... 7-1992						

See PAGE 3-

Interval (per Section II) Start Date End Date Ltr. Totals Code Dev

HELMAN, Gilbert A.

DUFFY, J.

PROCEEDINGS

Filed memo to clerk... Oral argument begun & concluded on defts motion to
set aside guilty plea.....Dec. Reserved.....Duffy, J.

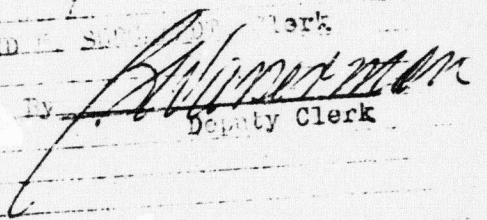
Filed Opinion and Order No. 45930 -For the reasons stated, The
motion to vacate the judgment of conviction is Denied.
The motion will also be considered as an application pursuant
to 28 USC §2255; as such it is Denied. The pre-sentence
report is ordered sealed and made a part of the record.
SO ORDERED. DUFFY, J. m-n-notified US Attorney & copy to Probation.

Filed NOTICE OF APPEAL of deft/ from opinion and order filed 5-19-77
of Duffy, J. denying deft's motion to withdraw guilty plea.
copy to U.S. Attorney.

Filed one manila envelope..Contents ordered sealed and placed
in clerks office (Probation Report).....Duffy, J.

Filed Notice that ^{1st} Supplemental record on appeal has been certified and
transmitted to USCA 2nd circuit this day.

RECORDED & INDEXED

By  Deputy Clerk

Approved: HARRY G. BATCHELDER, Jr.
Assistant United States Attorney

76CR.441 K.T.D.

Before: HONORABLE CHARLES J. HARTENSTINE
United States Magistrate,
Southern District of New York.

75-1640

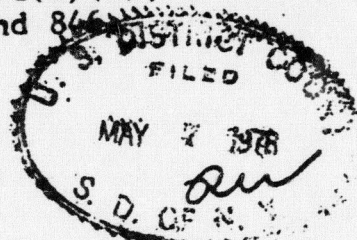
UNITED STATES OF AMERICA

COMPLAINT

-v-
GILBERT ANDREW FRIEDMAN, and
ALAN LESTER GASSBERG,

Violation of
21 U.S.C. §§ 812,
841(a)(1), 841(b)(1)(A)
and 846

Defendants .



SOUTHERN DISTRICT OF NEW YORK, ss.:

ADAM MANGINO
deposes and says that he is a Special Agent, Drug
Enforcement Administration

, being duly sworn.

and alleges and charges as follows:

1. From on or about the 1st day of December 1975, and continuously thereafter up to and including the date of the filing of this complaint, in the Southern District of New York,

GILBERT ANDREW FRIEDMAN, and
ALAN LESTER GASSBERG

the defendant and others unknown, unlawfully, intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

B

2. It was part of said conspiracy that the said defendants unlawfully, intentionally and knowingly would distribute and possess with intent to distribute Schedule III ~~known~~ drug controlled substances the exact amount thereof being unknown in violation of Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code

B

Form USA-33a-539 p.2 - COMPLAINT (Conspiracy to Distribute Narcotic Drugs)

HB:ko

OVERT ACTS

1. In pursuance of the said conspiracy and to effect the objects thereof, on or about the 1st day of December, 1975, in the Southern District of New York, the defendants GILBERT FRIEDMAN and ALAN GASSBERG went to the vicinity of 2nd Ave. and 86th St., New York, N.Y.
- (2) On or about December 1, 1975 ALAN GASSBERG while in vicinity of East End Ave. between 87th and 88th Streets, New York, N.Y. sold 1,000 amitol, valium and nebutol pills for \$550.
- (3) On or about December 15, 1975 while in the vicinity of East 41st St., and 2nd Ave., New York, N.Y. sold approximately 1,000 amitol, valium and nebutol pills for \$1,550 and delivered 5,000 of same.
- (4) On or about December 15, 1975 the defendant GILBERT FRIEDMAN and ALAN GASSBERG met at 301 E. 48th St., New York, N.Y.
- (5) On or about December 15, 1975 the defendant GILBERT FRIEDMAN had in his possession while in apartment 5-g at 301 E. 48th St., New York, N.Y. approximately 40,000 amitol, nebutol and valium pills.

The sources of deponent's information and the grounds of his belief are investigations conducted by him in the course of his official duties, including: Surveillance conducted by him on December 1, 1975 and December 15, 1975.

- (2) Discussions with the undercover officer who purchased the drugs from ALAN GASSBERG on December 1st and 15th. Statements made by both defendants on December 15th as well as seizure of the aforementioned 40,000 pills from the apartment of GILBERT FRIEDMAN.

WHEREFORE, deponent prays that a warrant may issue for the apprehension of the above named defendants and that they may be arrested and imprisoned, or bailed, as the case may be.

Sworn to before me this
16th day of December
1973

C. J. Hartenstine
C. J. HARTENSTINE
U.S. MAGISTRATE
S.D.N.Y.

Adam Mangino
ADAM MANGINO
Special Agent
Drug Enforcement Administration
Department of Justice

MEMORANDUM

(DISPOSITION SHEET)

ASSISTANT U.S. ATTORNEY:

BATCHER12:05 PM
TIME:75-1640
DOCKET:

Defendant warned of right to remain silent and that anything said can be used against him (her) (them) in the future.

The charge of violation of Title 21 USC §§ 812, 844, 848 explained. Advised of right to counsel at all stages of proceedings and that if the defendant has no funds counsel will be assigned.

DEFENDANT'S NAME	PRIVATE COUNSEL	ASSIGNED COUNSEL	COUNSEL AT I.P.	RAIL DISPOSITION
① GILBERT FRIEDMAN	WASSIM WILLIAMS		MR. P	\$5,000 PRB
ALAN BRASBERG	WASSIM	Legal Aid		\$5,000 PRB

PRELIMINARY EXAMINATION DATE:

1/5/76

COMMENTS:

- ② Govt recom \$5000 PRB
① " " 10,000 PRB

DATED:

12/16/75

THIS COMPLAINT
FAILS TO SHOW
PROBABLE CAUSE
EXCEPT BY STRETCHING
MEANING OF EVERY
WORD. BAIL ASSET

J. Hartman
UNITED STATES MAGISTRATE

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

CRIMINAL

Designation form to be used by the United States Attorney to indicate the
Category of the offense for purposes of Assignment to the Appropriate Calendar.

UNITED STATES OF AMERICA

This space reserved for Clerk's Office

vs.

Check if in Custody

DOCKET NO.

DATE OF FILING

DATE OF ASSIGNMENT

ASSIGNED JUDGE

DEPT'S COUNSEL

DEPT'S D/O/B

1. GILBERT ANDREW FRIEDMAN
301 E. 48th Street
2. Apt. 5G
New York, New York
3. ALAN LESTER GRASSBERG
4. 6210 17th Avenue
(Top Floor)
5. Brooklyn, New York

(For additional defendants a separate list may be appended.)

PENDING RELATED CASE(S), IF ANY

Docket No.

Judge

CRIMINAL cases are deemed related if pending case involves:

1. () Same defendant or issue of fact.
2. () Additional indictment or information.
3. () Superseding indictment or information.

SIX MONTH RULE COMMENCED

12/16/75

Date

Place an (x) in ONE category, ONLY.

() Miscellaneous Motions

1. () Larceny and Theft
2. () Embezzlement
3. () Income Tax
4. () Securities laws
5. () Fraud (other than 3 or 4)
6. () Forgery and Counterfeiting

7. (X) Narcotics and Controlled Drugs
8. () Bribery
9. () Immigration laws
10. () Antitrust
11. () Selective Service
12. () All Other

The United States Attorney will please designate the particular offense or offenses charge to be violated.

<u>U.S. Code Title and Section</u>	<u>No. of Counts</u>	<u>Description of Offense</u>	<u>Maximum Penalty</u>
1. <u>21 U.S.C. §846</u>	<u>1</u>	<u>Conspiracy to distribute</u>	<u>5 years/</u>
		<u>controlled substance</u>	<u>\$15,000</u>
			<u>3 Years</u>
			<u>Special</u>
			<u>Parole</u>
2. <u>21 U.S.C. §812, 841(2)(1)</u> <u>and 841(b)(1)(A)</u>	<u>4</u>	<u>Possession with intent and</u>	<u>5 years/</u>
		<u>distribution of controlled</u>	<u>\$15,000</u>
		<u>substance</u>	<u>3 Yrs. S</u>
			<u>cial Par</u>
3. <u>18 U.S.C. §2</u>	<u>2</u>	<u>Aiding and abetting in sub-</u>	<u>5 years/</u>
		<u>stantive distribution or</u>	<u>\$15,000</u>
		<u>possession with intent to</u>	<u>3 Yrs. S</u>
		<u>distribute</u>	<u>cial Par</u>

ROBERT B. FISKE, JR.

UNITED STATES ATTORNEY
SOUTHERN DISTRICT OF NEW YORK

HARRY C. BATCHELDER, JR.
By Assistant U.S. Attorney

Signature

(212) 791-0071
Telephone No. & Extension

SDNY DESIGNATION FORM
CRIM

CRIMINAL-IRIM CLERK

INDICTMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

76 CR. 3441

UNITED STATES OF AMERICA

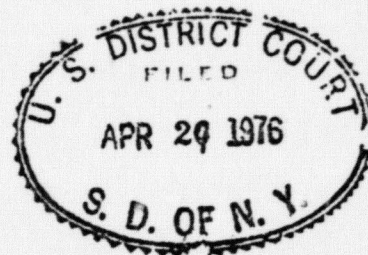
- v -

GILBERT ANDREW FRIEDMAN,
a/k/a "Chris" and
ALAN LESTER GASSBERG,
a/k/a "Alan Carson",

Defendants.

INDICTMENT

76 Cr.



The Grand Jury charges:

1. From on or about the 1st day of December 1975, and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York, GILBERT ANDREW FRIEDMAN, a/k/a "Chris" and ALAN LESTER GASSBERG, a/k/a "Alan Carson", the defendants and others the Grand Jury unknown, unlawfully, intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 812, 841(a)(1) and 841(b)(1)(B) of Title 21, United States Code.

2. It was part of said conspiracy that the said defendants unlawfully, intentionally and knowingly would distribute and possess with intent to distribute Schedule III narcotic drug controlled substances the exact amount thereof being to the Grand Jury unknown in violation of Sections 812, 841(a)(1) and 841(b)(1)(B) of Title 21, United States Code.

OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York:

1. On or about December 4, 1975 the defendant ALAN LESTER GASSBERG, a/k/a "Alan Carson" went to the vicinity of 86th Avenue and Second Avenue, New York, New York.

2. On or about December 4, 1975 the defendants ALAN LESTER GASSBERG, a/k/a "Alan Carson" and GILBERT ANDREW FRIEDMAN, a/k/a "Chris" went to the vicinity of East End Avenue between 87th and 89th Street, New York, New York.

3. On or about December 4, 1975 the defendant ALAN LESTER GASSBERG, a/k/a "Alan Carson" sold approximately 250 secanol tablets, 300 numbutal tablets and 500 valium tablets for \$1,550.

4. On or about December 15, 1975 the defendant ALAN LESTER GASSBERG, a/k/a "Alan Carson" went to the vicinity of 41st Street and Second Avenue, New York, New York received \$1,550.

5. On about December 15, 1975 the defendants ALAN GASSBERG, a/k/a "Alan Carson" and GILBERT ANDREW FRIEDMAN, a/k/a "Chris" had a meeting in apartment 5G, 301 East 49th Street, New York, New York.

6. On or about December 15, 1975 the defendant ALAN LESTER GASSBERG, a/k/a "Alan Carson" delivered a quantity of barbituates in the vicinity of 41st Street and Second Avenue, New York, New York.

7. On or about December 15, 1975 the defendant GILBERT ANDREW FRIEDMAN, a/k/a "Chris" secreted in his apartment approximately 10,000 barbituates.

(Title 21, United States Code, Section 846).

COUNT II

A-13

The Grand Jury further charges:

On or about the 4th day of December 1975, in the Southern District of New York, GILBERT ANDREW FRIEDMAN, a/k/a "Chris" and ALAN LESTER GASSBERG, a/k/a "Alan Carson", the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule III controlled substance, to wit, approximately 58,192 miligrams of barbituric acid contained in 250 secanol tablets, 300 numbutal tablets and 500 valium tablets.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(B); Title 18, United States Code, Sections 2.)

COUNT III

The Grand Jury further charges:

On or about the 15th day of December 1975, in the Southern District of New York, GILBERT ANDREW FRIEDMAN, a/k/a "Chris" and ALAN LESTER GASSBERG, a/k/a "Alan Carson", the defendants, unlawfully intentionally and knowingly did distribute and possess with intent to distribute a Schedule III controlled substance, to wit, 23,610 miligrams of barbituric acid contained in approximately 500 valium tablets and E.I. Lilly's Sulphate tablets.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(B); Title 18, United States Code, Section 2.)

COUNT IV

The Grand Jury further charges:

On or about the 15th day of December 1975, in the Southern District of New York, ALAN LESTER GASSBERG, a/k/a "Alan Carson", the defendant, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule III controlled substance, to wit, 62,910

7b
miligrams of barbituric acid contained in 5,102 tablets of various manufacture.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(B); Title 18, United States Code, Sections 2.)

COUNT V

The Grand Jury further charges:

On or about the 15th day of December 1975, in the Southern District of New York, GILBERT ANDREW FRIEDMAN, a/k/a "Chris", the defendant, unlawfully intentionally and knowingly did distribute and possess with intent to distribute a Schedule III controlled substance, to wit, approximately 225,895 miligrams of barbituric acid contained in 10,888 tablets of various manufacture.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(B); Title 18, United States Code, Section 2.)

Carlton C. Guggen
FOREMAN

Robert B. Fiske Jr.
ROBERT B. FISKE, JR.
United States Attorney

A TRUE COPY

RAYMOND F. BURGLARDT, Clerk

C. J. Rooney
Clerk

NOTICE OF READINESS FOR TRIAL
SOUTHERN DISTRICT OF NEW YORK

A-15

UNITED STATES OF AMERICA

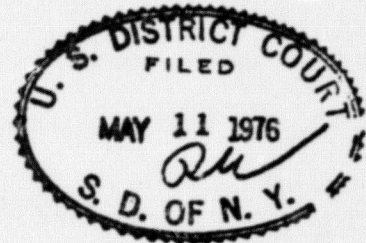
-v-

GILBERT ANDREW FRIEDMAN
and
ALAN LESTER CASSBERG

Defendant .

NOTICE OF READINESS
FOR TRIAL

76 Cr. 441 (KTD)



S I R S :

PLEASE TAKE NOTICE that the United States will
be ready for trial in this case as soon as the matter can
be reached by the Court on or after May 10, 1976
subject to receiving five days' advance notice of the
actual date for trial.

Dated: New York, New York
May 10, 1976

Yours, etc.,

ROBERT B. FISKE, JR.,
United States Attorney for the
Southern District of New York
Attorney for the United States
of America

By:

HARRY C. BATCHELDER, JR.
Assistant United States Attorney
Telephone: (212) 791-0071

TO: HONORABLE KEVIN T. DUFFY
United States District Judge
Federal Defender Services Unit
15 Park Row
New York, New York

ALAN PASSIN, Esq.,
521 5th Avenue
New York, New York

JUDGMENT AND COMMITMENT

United States District Court for

SOUTHERN DISTRICT OF NEW YORK

United States of America vs.

GILBERT ANDREW FRIEDMAN,

A/K/A "Chris"

DOCKET NO. ➔

76 Crim. 441

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government
the defendant appeared in person on this date ➔MONTH DAY YEAR
SEPTEMBER 17, 1976

COUNSEL

☐ WITHOUT COUNSEL

However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☐ WITH COUNSEL

Allan Passin, Esq.

(Name of counsel)

PLEA

☒ GUILTY, and the court being satisfied that
there is a factual basis for the plea,☐ NOLO CONTENDERE,☐ NOT GUILTY

There being a finding/verdict of

☐ NOT GUILTY. Defendant is discharged
☐ GUILTY.FINDING &
CONVICT

Defendant has been convicted as charged of the offense(s) of Conspiracy to violate Sections 812, 841(a)(1), 841(b)(1)(B) of Title 21. It was part of said conspiracy that the deft. with others would distribute and possess with intent to distribute Schedule III narcotic drug controlled substances. Title 21, U.S. Code, Section 846.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

THREE (3) YEARS on count 1.

SENTENCE
OR
PROBATION
ORDER

Pursuant to the provisions of Title 21, U.S. Code, Section 841, the defendant is placed on special parole for a term of THREE (3) YEARS, to commence upon expiration of prison sentence.

**SPECIAL
CONDITIONS
OF
PROBATION**

Counts 2,3 & 5 are dismissed by the Court on defense counsel's motion, no objection by the Government.

Defendant is continued on present bail until October 1, 1976 at 10:30 A.M. at which time defendant is to surrender to the U.S. Marshal in room 506 for service of sentence.

**ADDITIONAL
CONDITIONS
OF
PROBATION**

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

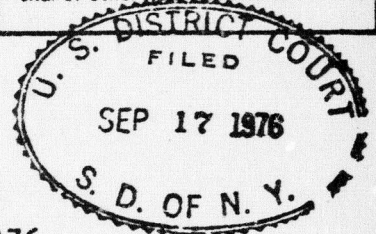
**COMMITMENT
RECOMMEN-
DATION**

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

4 MICROFILM

SEP 20 1976



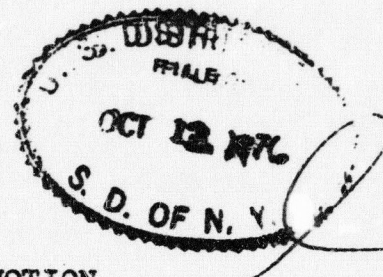
SIGNED BY
U.S. District Judge

KEVIN THOMAS DUFFY

September 17, 1976

DEFENDANT'S NOTICE OF MOTION

WITH MEMO ENDORSED DATED OCT. 12, 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK-----X
UNITED STATES OF AMERICA, :76CR 441
KTD

v. :

GILBERT FRIEDMAN :

NOTICE OF MOTION-----X
S I R :

PLEASE TAKE NOTICE that defendant Gilbert Friedman will move this Court on Friday October 1, 1976 at 10:00 A.M. at the United States District Courthouse, Foley Square, New York, New York for an Order, postponing the date on which defendant is to surrender from October 1, 1976 to October 15, 1976, and for such other and further relief as the Court deems just and proper.

Yours, etc.

David L. Fox

David L. Fox
Attorney for Defendant
600 Madison Avenue
New York, New York 10022
(212) 751-1550

TO:
CLERK'S OFFICE
United States District Court
Southern District of New York

ROBERT FISKE, ESQ.,
United States Attorney
Southern District of New York
Attention: Harry Batchelder, Esq.
Assistant U.S. Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
UNITED STATES OF AMERICA : 75CR
 : KTD
 v. :
 : AFFIDAVIT
GILBERT FRIEDMAN :
-----x

GILBERT FRIEDMAN, being duly sworn deposes and
says:

I am the defendant in the above criminal matter.
On September 17, 1976, following the entry of a plea of guilty,
I was sentenced by this court to serve a prison term of three
years with two years probation. I was directed to surrender on
October 1, 1976 at 10 A.M.

Following the pronouncement of this sentence,
and on or about September 24, 1976, I retained David L. Fox, Esq.
of 600 Madison Avenue, New York, New York 10022 to bring a
motion under Rule 35 of the Federal Rules of Criminal Procedure.
I also requested that Mr. Fox seek a postponement of at least
two weeks of the date on which I must surrender to begin serving

the sentence. I requested the postponement on two grounds: First, because I need the additional time to gather the evidence necessary to support my Rule 35 motion. Second, because such time is needed to settle my personal and business affairs including subletting of my apartment, disposing of my personal property, and complying with IRS requests for information in connection with a tax audit that it is presently conducting.

Mr. Fox has advised me that the U.S. Attorney, by Assistant U.S. Attorney Harry Batchelder, has agreed to a two weeks postponement. However, this court has denied Mr. Fox's informal request for such postponement. I am therefore taking this opportunity to explain the reason for my request in greater detail with the hope that the court will reconsider it.

It is my belief that the probation report submitted to the court was in error in several material respects. Particularly, the report indicated that I had dealt in drugs with Allen Gasberg on numerous prior occasions. I believe that I can establish that this is not true. The report further indicated that the Government is investigating the affairs of a certain company in which I had an interest. I believe I can

establish that the investigation was started at the request of the officers of the company and does not reflect unfavorably upon me. I believe that the report contains several other errors. However, to prove these matters to the court's satisfaction requires me to be in New York and in touch with Mr. Fox so that I can provide him with the information and documents he has informed me will be needed. This is particularly true because Mr. Fox is a newcomer to this case. My prior attorney, Allen Passin, Esq., has refused to represent me any further, because I have been unable to pay him. Mr. Fox advised me that he has been unable to obtain Mr. Passin's file.

With respect to my personal affairs, I have arranged to sublet my apartment, the sublease will be signed next week. I am also arranging for the disposition of my personal property. At the same time, I am attempting to supply the IRS with certain documents it has requested for its audit of my Income Tax return for the calendar year 197 . The IRS has requested that I obtain letters from certain charitable organizations to which I made donations, and I am attempting to comply with that request. I cannot complete any of these matter by October 1, 1976, although I have attempted to do so.

Upon all of the foregoing I respectfully request that my surrender, which is now scheduled for October 1, 1976, at 10 A.M., be postponed for two weeks until October 15, 1976. If such relief is denied, I will not have a fair opportunity to fully present my proof as to the above matters, or to arrange my personal affairs.

Gilbert Friedman

Sworn to before me this

1st day of ~~September~~ ^{October}, 1976.

David L. Fox

DAVID L. FOX
Notary Public, State of New York
No. 31-4617718
Qualified in New York County
Commission Expires March 30, 1977

A-23

NOTICE OF ENTRY

Sir-Please take notice that the within is a (certified) true copy of a duly entered in the office of the clerk of the within named court on 19

Dated,

Yours, etc.,
DAVID L. FOX

Attorney for

Office and Post Office Address:
600 MADISON AVENUE
NEW YORK, N. Y. 10022

To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir-Please take notice that an order

of which the within is a true copy will be presented for settlement to the Hon.

one of the judges of the within named Court, at

on the day of 19

M.

Dated,

Yours, etc.,
DAVID L. FOX

Attorney for

Office and Post Office Address:
600 MADISON AVENUE
NEW YORK, N. Y. 10022

To

Attorney(s) for

Index No.

Year 19

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v.

GILBERT FRIEDMAN

NOTICE OF MOTION

DAVID L. FOX

Attorney for Defendant

Office and Post Office Address, Telephone
600 MADISON AVENUE
NEW YORK, N. Y. 10022
212 PL 1-1950

To

Attorney(s) for

Service of a copy of the within

Dated,

is hereby submitted.

Attorney(s) for

ENDORSEMENT

Motion granted.

SO ORDERED.

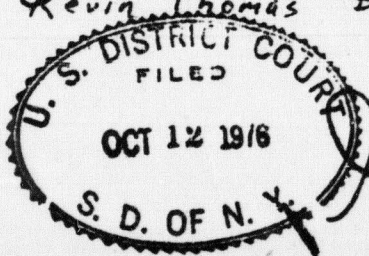
MICROFILM

OCT 12 1976

New York, New York
October 1, 1976

Kevin Thomas

Duffy, U.S.D.J.



NOTICE OF APPEAL FROM ORDERS
DATED DECEMBER 3, 1976, and
December 6, 1976

rw A-24
U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DEC 14 3 33 PM '76

S.D. OF N.Y.

UNITED STATES OF AMERICA,

: 76 CR 441

-v-

: NOTICE OF APPEAL

GILBERT FRIEDMAN

:

-----x

NOTICE is hereby given that defendant, Gilbert Friedman

hereby appeals to the United States Court of Appeal for the

Second Circuit from the order entered in the above action on

December 3, 1976 and December 6, 1976, which denied said defendants'

Motion to Reduce the sentence herein.

Dated: New York, New York
December 10, 1976.

David L. Fox

DAVID. L. FOX

Attorney for Defendant

600 Madison Avenue

New York, New York 10022

(212) 751-1550

TO: HARRY C. BATCHELDER, Jr.
United States Attorney
U.S. Courthouse
One St. Andrew's Plaza
New York, New York 10007
(212) 791-0071

DEFT

C/O ATTY DAVID L. FOX

MEMO ENDORSED

A-25

76 CR. 441

MEMO ENDORSED ON UNFILED LETTER FROM DEFENDANT
DATED DECEMBER 16, 1976

Tues. Dec 7, 1976

Your Honor,

I am presently in the detention area of the Haute P.C.S. Being placed (due to the fact that I am still a hold-over) in the same area is the most difficult inmates of this facility is a most terrifying experience. Listening to the conversations between these prisoners; one of which was an exchange of methods for successfully robbing banks, makes me ask myself, if this is the environment in which you feel I will best be able to rehabilitate myself and thus, become the type of citizen I was before committing this crime.

I am sure you have received many letters from people who you have sent to jail, that although they truly feel they have committed a crime, they don't think of themselves as part and parcel of the criminal society this country has. Your Honor I am firmly convinced that I in no way belong with these people. In fact, I think that continued exposure to the element of people presently in prison could be very detrimental to me emotionally.

Your Honor, I am not now and was I ever involved with anyone who was a member of any kind of organized criminal activity. I was alone in this. (Except for Mr. Rosenberg who was my link to the drug buyers.)

Being placed into this environment has caused me to suffer greatly. It is very difficult for me to relate and adjust to this environment. Never before have I been associated with people who have committed, and are being punished, for crimes far more severe than the one I have committed. The contrast in lifestyles and family background is so great I often wonder, (as some of the inmates have also expressed), that my fellow inmates think I am so alien to their way of life that I could pose as a threat to them.

Violent crimes, (murder, assaults, rapes; yes rapes) are a part of every institution in the prison system. I have never in my adult life had any kind of violent contact. I haven't even had a fist fight in fifteen years. It isn't easy sleeping when you hear that this one was knifed or that one was attacked by a group. It happens your Honor and I'm afraid, being so alien to these people, that it could happen to me. Don't get me wrong, nothing like what I have discussed above has happened. But, the threat is enough to cause me great emotional discomfort.

Please take what I have discussed with you in the serious tone that it is intended. I know, and I hope I have convinced you, that in the interest of my rehabilitation and welfare a reduction in my sentence is indicated.

(3)

It doesn't take much time in here to realize the validity of my request. Spending my first two weeks in 4 different jails and listening confirms my thoughts.

Please, I beg of you, give me the opportunity to prove that justice will best be served by reducing my sentence and letting me go out into society where I feel I belong.

Respectfully

Gilbert Friedman

04602-158

ENDORSEMENT
76 Cr. 441

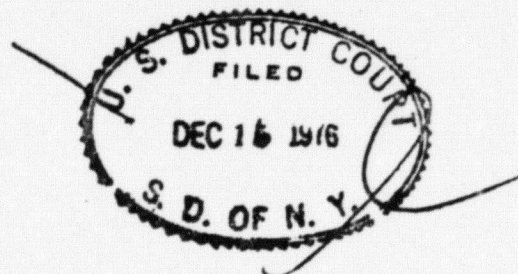
The annexed letter is considered as a motion to reduce sentence under Rule 35, Fed. R. Crim. P. I have once again reviewed this man's presentence report. Having done so, I remain convinced that the original sentence imposed was just and correct.

The motion is denied.

SO ORDERED.

John Thomas Jeff
U.S.D.J.

New York, New York
December 15, 1976



MICROFILM

DEC 16 1976

Close 11

NOTICE OF APPEAL FROM ORDER DENYING REDUCTION
OF SENTENCE DATED DECEMBER 12, 1976

A-29

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Today within
John
AT
FILED
U.S. DISTRICT COURT

DEC 23 3 12 PM '76

S.D. of N.Y.

-----x
UNITED STATES OF AMERICA,

v.

GILBERT FRIEDMAN

:
:
76 CR 441

:
KTD

: NOTICE OF APPEAL
-----x

NOTICE IS HEREBY GIVEN that defendant, Gilbert Friedman hereby appeals to the United States Court of Appeals for the second circuit from the Order entered in the above action on December 13, 1976, which denied said defendant's Motion to Reduce the Sentence herein.

Dated: New York, New York
December 22, 1976

Yours, etc.

David L. Fox

David L. Fox
Attorney for Defendant
600 Madison Avenue
New York, New York 10022

TO: Harry Batchelder, Esq.
Assistant U.S. Attorney
United States Courthouse
1 St. Andrews Plaza
New York, New York 10007

Clerk of the Court
United States District Court
Southern District of New York
Foley Square
New York, New York

18

DEFENDANT'S NOTICE OF MOTION TO DISMISS
DATED MARCH 3, 1977

A-30

RESPECTFULLY REFERRED TO HON.
JUDGE KEVIN THOMAS DUFFY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

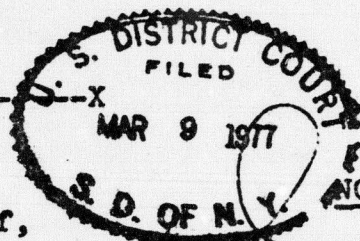
UNITED STATES OF AMERICA,

Plaintiff,

-against-

GILBERT ANDREW FRIEDMAN, a/k/a "CHRIS",

Defendant.



NOTICE OF MOTION

No. 76 Cr. 441 K.T.D.

S I R S :

PLEASE TAKE NOTICE that upon the annexed affirmation of WILLIAM L. FINGER, duly affirmed to the 3rd day of March, 1977, and the annexed Exhibits and memorandum signed will move this Court at a Motion of the Hon. Kevin Duffy, District Court Judge of this Court located at Foley Square, on the 15th day of March, 1977, at 9:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard for an Order vacating and/or dismissing your petitioners sentence of the 27th day of September, 1976 before this Court, or a hearing on the matter be established, or such other and further relief as to this Court seems just, proper, and equitable.

Dated: Queens, New York
March 3, 1977

Yours, etc.,
William L. Finger
WILLIAM L. FINGER, ESQ.
Attorney for Defendant
125-10 Queens Boulevard
New Gardens, New York
11415
268-2400

TO: United States Attorney
District Court for the Southern
District of New York
Foley Square, New York, NY

RESPECTFULLY REFERRED TO
HON. JUDGE KEVIN THOMAS DUFFY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

UNITED STATES OF AMERICA,

Plaintiff,

-against-

GILBERT ANDREW FRIEDMAN, a/k/a "CHRIS",

Defendant.

MOTION FOR POST CONVICTION
RELIEF UNDER RULE 32(d) OF
THE RULES OF CRIMINAL
PROCEDURE, OR, IN THE
ALTERNATIVE, MOTION FOR
WRIT OF ERROR CORAM NOBIS

No. 76 Cr. 441 K.T.D.

-----X

Defendant, GILBERT FRIEDMAN, by his attorney,
WILLIAM L. FINGER, moves the Court to grant him relief from the
judgment of conviction entered hereinabove against him by
setting aside the judgment of conviction and permitting defendant
to withdraw his plea in accordance with Rule 32(d) of the Rules
of Criminal Procedure, or in the alternative, moves the Court
to grant a Writ of Error Coram Nobis, and as a basis therefor
sets forth the following:

1. The defendant was convicted on one count of con-
spiracy to possess narcotic drugs with intent to distribute.

2. Although a plea of Not Guilty to all counts
had originally been entered to the indictment, this was
withdrawn on the 27th day of July, 1976, and a plea of guilty was
entered and accepted by the HON. KEVIN THOMAS DUFFY, District Court
Judge.

3. On the 17th of September, 1976, the defendant
was sentenced to three years in jail and three years special pro-

bation by Judge Duffy. He has surrendered and is currently serving this term.

4. The defendant did not knowingly and intentionally offer the plea of guilty, which was entered. He did not have a knowledge of the nature of the proceedings or an understanding of the consequences of the plea, as is more specifically set forth hereinbelow and in the annexed memorandum of law.

5. As a general matter, before a plea can be accepted, it must be quite clear that the defendant understands the charges. Otherwise, unconstitutionality will be resultant. Boykin v. Alabama, 395 U. S. 238 (1969). Thus, Federal Rule 11 requires that the judge ascertain, on the record, that the plea being entered is truly voluntary in nature based upon the defendant's understanding of the law. McCarthy v. United States, 394 U. S. 459, 466 (1969); Santobello v. New York, 404 U. S. 257, 261 (1971).

6. In the Second Circuit, McCarthy and Santobello have been strictly construed. Thus with respect to a guilty plea to a conspiracy to distribute drugs, the Circuit Court has specifically held that:

" . . . while the Court need not explore every nook and cranny of conspiracy law before accepting a guilty plea, it must at least set out the bare bones elements of the offense. At a minimum, a defendant. . . (should understand) that such a charge requires proof of an agreement between two or more persons to commit an offense. . . ; knowledge of the existence of a conspiracy; and an intent to participate in the unlawful enterprise." Irizarry v. United States,

505 F. 2d 960 (2d Cir. 1975). See, also, Rizzo v. United States, 516 F. 2d 789 (2d Cir. 1975).
Cf., Seiller v. United States, 544 F. 2d 554 (2d Cir. 1975).

7. In the case at bar, a study of the hearing minutes reveals that District Judge Duffy never fully explored the nature of the charges (see Hearing minutes annexed hereto as Exhibit "A"). Although exploration of the plea itself by the accepting judge is a requirement, Rule 11 was not complied with.

8. Of further interest to the case at bar is the fact that a defendant must understand the full consequences of his plea. See, e.g., Saddler v. United States, 531 F. 2d 83 (2d Cir. 1976). A full explanation of special parole is inexplicably missing from the plea minutes. Additionally, upon acceptance of the plea, Judge Duffy indicated that two years special parole could be granted instead of the three years required by law. Plea Minutes (D.C. N. Y., July 27, 1976) p. 4. This surely requires a vacating of the sentence herein. See, e.g., United States v. Richardson, 485 F. 2d 516 (8th Cir. 1973). Cf., Michel v. United States, 507 F. 2d 461 (2d Cir. 1974).

9. Additionally, faced with poor representation (see below) and the pressures of the sentencing date, it is quite clear that the defendant's alleged waiver was coerced rather than voluntary. United States v. Tateo, 214 F. Supp. 560 (D.C. N. Y. 1963).

10. It is also abundantly clear that a defendant has a right to effective assistance of counsel. Reece v. Georgia, 350 U. S. 85, 90 (1955). In general, this means that legal assistance was adequate enough so as not to ". . . be of such a kind as to shock the conscience of the Court and make the proceedings a farce and mockery of justice." United States v. Wright, 176 F. 2d 376, 379 (2d Cir., 1949), cert. denied, 338 U.S. 950 (1950). See, e.g., United States v. Joyce, 542 F. 2d 158 (2d Cir. 1976). But, we suggest to this Court that it is the better rule to use the test of the District of Columbia Circuit whereby the question is whether gross incompetence has blotted out the essence of a substantial defense. Scott v. United States, 427 F. 2d 600, 610 (D.C. Cir. 1970).

11. Regardless, trial counsel failed to reach even minimal levels of effectiveness in that a notice of appeal was not filed within the ten days prescribed by Rule 37(a)(2). The frustration of this basic right in and of itself requires the plea and the sentence to be vacated. See, e.g., Collins v. United States, 418 F. Supp. 577, 581 (D.C. N. Y. 1976).

12. Although trial counsel is not expected to be a non-failing purveyor of the percentages of conviction, he is expected to perform more than a cursory investigation. Motion practice is also vital to assure correct tactical procedures. Cf. Massimo v. United States, 331 F. Supp. 519 (D.C. N. Y. 1972), aff'd. 463 F. 2d 1171 (2d Cir. 1972), cert. denied, 409 U.S. 1117 (1973).

13. In order to pursue this course, defense counsel should, therefore, arm himself with an exhaustive study

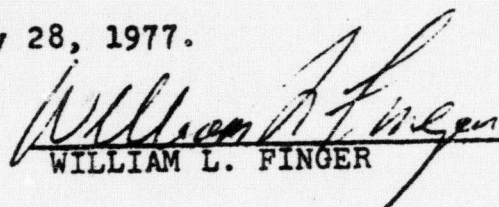
of all the existant facts. If he has not adequately prepared, it is impossible for him to advise his client and the plea must be vacated. See, e.g., United States v. Moore, 529 F. 2d 355 (D. C. Cir. 1976). In the case at bar, your petitioner was never informed of why a plea was necessary. Witnesses were never investigated. Possible defenses were not explored. Thus one must openly question the solution tactically taken by trial counsel.

14. A further defect herein was the improper reliance of District Judge Duffy upon an inaccurate pre-sentence report. It produced a picture of your petitioner quite different from his true nature. It neglected the circumstances surrounding the alleged circumstances. By claiming he was a liar and financial manipulator, the pre-sentence report influenced the Court toward an incorrect course despite the protestations of counsel and the petitioner. This misinformation and misunderstanding rendered the entire sentencing procedure invalid as violative of due process. United States v. Malcolm, 432 F. 2d 809 (2d Cir. 1970).

15. Thus these defects are of such a nature as to render the entire procedure unconstitutional prima facie or in the alternative, they warrant a hearing. Sanders v. United States, 373 U. S. 1 (1963). See, also, Farbo v. United States, 452 F.2d 132 (7th Cir. 1971).
WHEREFORE, your petitioner should be granted the relief so requested; and such other and further relief as to this

Court seems just, proper and equitable.

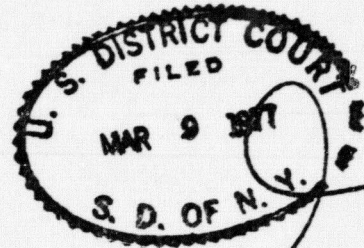
Dated; Queens, N. Y., February 28, 1977.


WILLIAM L. FINGER

DEFENDANT'S MEMORANDUM OF LAW IN
SUPPORT OF MOTION TO DISMISS

JUDGE DUFFIN

STEPHEN DAVID FINK, ESQ.,
On the Brief.



UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA,

Plaintiff,

-against-

GILBERT ANDREW FRIEDMAN, a/k/a
"CHRIS",

No. 76Cr. 441 K.T.D.

Defendant.
-----X

DEFENDANT'S MEMORANDUM OF LAW

WILLIAM L. FINGER
FINGER GOLDBERG ZINNER & FINGER
COUNSELLORS AT LAW
125-10 Queens Boulevard
Kew Gardens, New York 11415

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA,

Plaintiff,

-against-

MEMORANDUM OF LAW

GILBERT ANDREW FRIEDMAN, a/k/a
"CHRIS",

No. 76 Cr. 441 K.T.D.

Defendant.
-----X

INTRODUCTION

Within the American system of jurisprudence,
a writ of coram nobis:-

"... is used to attack a judgment of conviction that, although valid on its face, is nevertheless defective because of facts outside the record, where the defect is such as to deprive the defendant of his constitutional right to a fair trial." 18 Am. Jur. Trials "Coram Nobis Practice in Criminal Cases" §2.

It is the contention of your petitioner
that the writ should be issued herein.

FACTS

In the latter part of 1975, an investigation occurred by the Drug Enforcement Administration into the activities of both Alan L. Gassberg and Gilbert A. Friedman. As a result, on or about the 16th day of December, 1975 a complaint was filed in the District Court for the Southern District of New York charging your petitioner with violation of 21 U.S.C. §812, 841(a)(1), 841(b)(1), and 846. Your petitioner at that time was represented by one, Allan Passin, Esq., of 521 Fifth Avenue, New York, New York. Bail was set and your petitioner was released.

On the 29th day of April, 1976, an indictment was filed (76 Cr. 441) charging your petitioner with violation of the above noted sections. On the 6th day of May, a not guilty plea was entered by the Court and the case was assigned to District Judge Duffy. A pre-trial conference was held on the 14th of July, 1976 and trial was set for the 9th of August, 1976.

However, on the 27th of July, 1976, Gilbert Friedman withdrew his not guilty plea and plead guilty to the first count of the indictment (conspiracy to possess narcotic drugs with intent to distribute). On the 17th of September, the Honorable Kevin Duffy sentenced your petitioner to three (3) years with three (3) years of special parole. All other counts were dismissed.

Your petitioner subsequently failed to file a notice of appeal, although further motions were made pursuant to rule 35. All have been denied.

Now, your petitioner seeks to withdraw his plea and/or in the alternative be resentenced due to the denial of his constitutional right to Due Process.

More specifically:

1. His plea was not voluntarily entered.
2. He was denied effective assistance of counsel; and
3. He was improperly sentenced pursuant to an inaccurate pre-sentence report.

POINT IYOUR PETITIONER'S PLEA WAS
NOT VOLUNTARY IN NATURE.A. Generally.

As a general matter, before a plea is accepted, the record should clearly reflect the defendant's understanding of the charges. Such clarity is required for "Ignorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect coverup for unconstitutionality". Boykin v. Alabama, 395 U.S. 238 (1969).

It is the position of your petitioner that the plea obtained herein was not of a voluntary nature. Thus it must be the position of this Court that the plea of guilty be vacated since it was unfairly obtained. Kercheval v. United States, 274 U. S. 220 (1927).

B. Rule 11 has been violated herein.

Under Rule 11(d) of the Federal Rules of Criminal Procedure,

"The Court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or his attorney."

In discussing Rule 11, the United States Supreme Court noted that although it is not constitutionally mandated, it is designed to secure a truly voluntary plea. More specifically:

"A defendant who enters such a plea simultaneously waives several constitutional rights, including his privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers. For this waiver to be valid under the Due Process Clause, it must be an intentional relinquishment or abandonment of a known right or privilege. Johnson v. Zerbst, 304 U. S. 458, 464 (1938). Consequently, if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore voided. Moreover, because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." McCarthy v. United States, 394 U.S. 459, 466 (1969).

Thus:

"...the sentencing judge must develop, on the record (emphasis by Court), the factual basis for the plea, as, for example, by having the accused describe the conduct that gave rise to the charge." Santobello v. New York, 404 U. S. 257, 261 (1971)

The Second Circuit has applied McCarthy and Santobello quite strictly. It must clearly appear from the record that the defendant understood the nature of the charge he was pleading guilty to. See, Seiller v. United States, 544 F. 2d 554 (2d Cir. 1975); Rizzo v. United States, 526 F. 2d 789 (2d Cir. 1975); Irizarry v. United States,

505 F. 2d 960 (2d Cir. 1975). See, also, United States v. Landry, 463 F. 2d 253 (9th Cir. 1972); Majko v. United States, 457 F. 2d 790 (7th Cir. 1972); United States v. Cody, 438 F. 2d 287 (8th Cir. 1971), cert. denied, 409 U. S. 1010 (1971).

In Irizarry v. United States, supra, the defendant entered a guilty plea to one count (number three) of conspiracy to possess and distribute. He was subsequently sentenced to eight years imprisonment and five years of special parole. Upon accepting the plea of guilty, the Court and the defendant engaged in the following colloquy:

"The Court: Now, the charge to which you are pleading guilty, under the United States Code is a charge of conspiracy.

Now, you must tell this Court in your own words, what conspiracy you say you committed?

Defendant Irizarry: Well I know I was - that I was supposed to pick up at the time -

The Court: What's that?

Defendant Irizarry: I knew what I was going to pick up. That it was cocaine.

The Court: You were going to pick up cocaine?

Defendant Irizarry: Right.

The Court: Of course, you can't conspire with yourself.

Defendant Irizarry: No.

The Court: In order to conspire, you have to have somebody else to conspire with, is that true?

Defendant Irizarry: Yes.

The Court: Was there anyone else that you were working with in this agreement?

Defendant Irizarry: No. I was told by someone else to pick up that package.

The Court: You were told by someone else to pick up that package?

Defendant Irizarry: Yes.

The Court: And as a result of that conversation with someone else, you then did pick up the package?

Defendant Irizarry: I went to pick it up and I was caught before I picked it up.

The Court: What's that?

Defendant Irizarry: I was caught by the Federal agents.

The Court: You were caught. But you went with the--

Mr. Stechel: Could we first--

The Court: From whom?

Defendant Irizarry: This fellow named at the bar--

Mr. Stechel: From whom did you pick up the cocaine?

Defendant Irizarry: I went to a hotel room. The guy - Valenzuela. That's the name.

Id. at 963 n. 1."

Upon examination of the above, it soon becomes quite apparent that the Court failed to properly discern whether Irizarry truly knew the nature of the charge.

As Circuit Judge Smith indicated:

"Conspiracy is a somewhat complicated crime, and, while the court need not explore every nook and cranny of conspiracy law before accepting a guilty plea, it must at least set out the bare bones elements of the offense. At a minimum, a defendant should not be allowed to plead guilty to conspiracy under the statute here involved, 21 U.S.C. §846, unless he understands that such a charge requires proof of an agreement between two or more persons to commit an offense under Chapter I of the Drug Abuse Prevention and Control Act, 21 U.S.C. §801 et seq; knowledge of the existence of a conspiracy; and an intent to participate in the unlawful enterprise." Id. at 965-966.

It is submitted by your petitioner that the trial judge herein inadvertently committed the same error as did District Judge Constantino in Irizarry. More specifically, on the 27th of July, 1976 District Judge Duffy entered into the following colloquy:

"BY THE COURT:

Q How do you plead, guilty or not guilty?

A Guilty, your Honor.

Q You heard me just tell you co-defendant that I could not accept the plea unless I was convinced that it was voluntary, that you understood your rights and that you understood the consequences of your plea and, in fact, you were guilty. You heard me explain to him that he would have been entitled to a public trial by a judge, a judge and a jury if he persisted in a not guilty plea. Do you understand that?

A Yes, your Honor.

Q Do you know you would be entitled to call your own witnesses at such a trial and, if need be, I would issue orders for those people to show here?

A Yes.

Q The first count of this indictment basically charges you with conspiring with your co-defendant and possibly with other to possess with intent to distribute, and/or to distribute, certain schedule 3 narcotic drugs basically valium and amphetamines.

Do you understand that, sir?

A Excuse me, your Honor?

MR. PASSIN: Your Honor, my client explains to me there were no amphetamines at all.

THE COURT: As far as he was concerned, but as part of the conspiracy.

Q Do you agree it was part of the conspiracy?

A There was no amphetamines, your Honor, not to my knowledge.

Q But did you know about the valium?

A Yes Sir.

MR. PASSIN: Yes.

Q You know you could go to jail for five years and

pay a \$10,000 fine and two years' special parole? Do you understand that?

A Yes, your Honor.

Q Has anyone made any threats or promises to you to induce you to plead guilty?

A No.

Q Did anyone make or suggest to you that there was any understanding with me as to what kind of a sentence you are going to receive?

A No, your Honor.

Q In fact, did you have possession of these valium?

A Yes, I did, your Honor.

Q You still wish to plead guilty?

A Yes, your Honor.

Q Are you personally under the influence of any narcotic drug or even alcohol?

A No. your Honor.

Q Are you under the care of a psychiatrist or physician presently?

A Not at present, your Honor.

THE COURT: Counsel, do you know of any reason why a plea of guilty should not be accepted?

MR. PASSIN: I know of no reason, your Honor.

THE COURT: A plea of guilty will be accepted.
I find that it's knowledgeable, voluntary, has
a basis in fact."

Although your petitioner was pleading guilty to a conspiracy to possess and distribute, the trial judge failed to adequately explain what the true nature of the crime was, or even to assure himself of Friedman's guilt. In fact, your petitioner never clearly and unquestionably asserted that he was part of a conspiracy.

Similarly, in Rizzo v. United States, 516 F. 2d 789 (2d Cir. 1975), the Court noted that while a reading of the indictment coupled with an admission of guilt may be enough to satisfy Rule 11, this is not always the case. There should, in fact, be a full colloquy to verify defendant's guilt and the basis thereof.

In Seiller v. United States, 544 F. 2d 554 (2d Cir. 1975), for example, there was no question of the defendant's voluntary admission of guilt. Here:

1. Each count was clearly read and each specific overt act delineated;
2. Unlike Irigarry, the defendant acknowledged three times that he understood the respective charges;
3. Unlike Irigarry, the Court established that the defendant had extensively discussed this with his counsel and that everything was clearly understood.

When Seiller and Irizarry are contrasted to the dirth of discussion appearing in the case at bar, it is all the more apparent that Rule 11, as explained by McCarthy, has been violated.

C. Your petitioner did not understand all the consequences of his plea.

In addition to the specific pronouncements of Rule 11, a defendant should have a full understanding of all the consequences of his plea. See, e.g., Saddler v. United States, 531 F. 2d 83 (2d Cir. 1976); Bye v. United States, 435 F. 2d 177 (2d Cir. 1976), rev'g., 309 F. Supp. 402 Dist. Ct. S.D.N.Y. 1969), on remand, 53 F.R.D. 354 (1971). Cf. Serrano v. United States, 442 F. 2d 923 (2d Cir. 1971), cert. denied, 404 U.S. 844 (1971). This is especially pertinent as to sentence.

Of particular interest in the case at bar is the plaintiff's sentence to three years special parole. It is here that confusion sets in for the adjective special creates a form of sentence substantially different from the well-known concept of "parole". As a result, the colloquy of Rule 11 should reflect an understanding of the special connotation this brings. Otherwise the conviction must be vacated. United States v. Richardson, 483 F. 2d 516 (8th Cir. 1973). Cf. Michel v. United States, 507 F. 2d 461 (2d Cir. 1974).

In the case at bar, trial counsel for your petitioner never adequately explained the sentencing procedure. Additionally, District Judge Duffy inaccurately stated:

"You know you could go to jail for five years and pay a \$10,000 fine and two years' (emphasis added) special parole? Do you understand that." Plea Minutes (D.C. N. Y. July 27, 1976) p. 4.

Yet, upon sentencing, your petitioner received three years in jail, and three years of special parole.

Sentencing Minutes (D. C. N. Y., Sept. 17, 1976) p. 6. (Ex. B)

Thus prima facie, at the time of plea, Gilbert Friedman:

1. had not been informed by the Court or his lawyer, what special parole consisted of; nor

2. the true maximum term of special parole he faced.

C. Your petitioner's plea of guilty was coerced.

Despite the appearance of allegedly uncoerced answers to Rule 11 questioning, inquiry as to the voluntariness of the plea is not foreclosed. United States v. Tateo, 214 F. Supp. 560 (D.C. N.Y. 1963). As the Supreme Court long ago recognized, "It can hardly be questioned but that most persons on trial upon criminal charges are in a state of mental tension and great apprehension". Mircheval v. United States, 274 U. S. 220, 224 (1927).

Thus, in the case at bar, the generally poor representation provided by trial counsel led the petitioner

to plead guilty, despite his complete lack of understanding of the charges. As we have noted, and will note further, such a result arose out of ineffective representation and noncompliance with Rule 11.

D. Summary.

In sum:

1. Rule 11 has been violated herein thereby mandating vacation of plea and sentence.
2. Your petitioner was not adequately informed of the consequences of his plea;
3. Your petitioner's plea of guilty was coerced.

POINT II

THE PETITIONER IS ENTITLED TO THE RELIEF SOUGHT HEREIN FOR COUNSEL WAS SO INEFFECTIVE AS TO MAKE THE PROCEEDINGS A FARCE AND A MOCKERY OF JUSTICE.

A. General principles.

It is abundantly clear that in addition to the defendant's right to assistance of counsel, such counsel must be of effective stature. See, e.g., Reece v. Georgia, 350 U.S. 85, 90 (1955). Although counsel need not possess the ability to flawlessly predict court decisions, the advice given should fall "...within the range of competence demanded of attorneys in criminal cases". McMann v. Richardson, 397 U.S. 759, 771 (1970).

In the Second Circuit, stringent requirements have been established as the criteria for proving inadequacy of counsel. It was, in fact, nearly twenty-eight years ago that District Judge Smith articulated the concept that:

"....time consumed in oral discussion and legal research is not the crucial test of the effectiveness of the assistance of counsel. The proof lies in the character of the resultant proceedings, and unless the purported representation by counsel was such as to make the trial a farce and a mockery of justice, mere allegations of incompetency or inefficiency of counsel will not ordinarily suffice as grounds for the issuance of a writ of habeas corpus or the granting of a petition pursuant to 28 U.S.C. 2255...."

A lack of effective assistance of counsel must be of such a kind as to shock the conscience of the Court and make the proceedings a farce and mockery of justice."
United States v. Wright, 176 F. 2d 376,

3A (2d Cir., 1949), cert. denied 338 U. S. 950 (1950). See, United States v. Joyce, 542 F. 2d 158 (2d Cir. 1976); United States v. Yanishefsky, 500 F.2d 1327 (2d Cir. 1974); United States v. Walker, 492 F. 2d 1311 (2d Cir. 1974), cert. den., 417 U.S. 972 (1974); United States ex rel. Marcellin v. Mancusi, 462 F. 2d 36 (1972), cert. denied, 410 U.S. 917 (1972); United States v. Gonzalez, 321 F. 2d 638 (2d Cir. 1963); Gomez v. United States, 371 F. Supp. 1178 (D.C. N. Y. 1974); United States ex rel. Jablonsky v. Fellette, 291 F. Supp. 828 (D. C. N. Y. 1968). See, also Parker v. United States, 474 F. 2d 697 (9th Cir. 1973); Meran v. Hogan, 494 F. 2d 1220 (1st Cir. 1974).

This is not to say that the Wright ("farce and mockery") test has gone unchallenged. At least one Circuit has concluded that this rather aged:-

".....standard is no longer valid as such but exists in the law only as a metaphor that the defendant has a heavy burden to show requisite unfairness." Scott v. United States, 427 F. 2d 609, 610 (D.C. Cir. 1970).

Instead, the Circuit Court of Appeals for the District of Columbia has adopted the test as to whether gross incompetence blotted out the essence of a substantial defense.

Id. This leaves the Court with more viable results, well in line with the expansion of Sixth Amendment protection since Judge Smith's decision of 1949. See, e.g., United States v. Moore, 529 F. 2d 355 (D.C. Cir. 1976).

It is counsel's contention that the Scott test is better one and bears serious consideration by this Court. Considering that lack of effective criteria for admission of lawyers to the federal bar, the Wright test stands as an

unnecessary roadblock to effective justice. It has in fact been well-documented by Chief Judge Irving Kaufman of the Second Circuit that too often attorneys before the federal bar lack sufficient training to properly present a case. See, e.g., Kramer v. Biloki, Decision No. 76-3921 (D.C. N.Y. Feb. 8, 1977). To subject a citizen to the degradation of incarceration merely due to the fact that his ill-prepared counsel did not fall within the stringent parameters of Wright seems quite incongruous when aligned with the desire for more proficient representation before the federal bar.

But, this is not to say that your petitioner lacks sufficient facts to fall within the present Second Circuit test. On the contrary, regardless of the objective standard utilized by this Court, Gilbert Friedman was denied effective assistance of counsel.

B. Trial Counsel for your petitioner failed to file a notice of appeal or inform your petitioner of his right to appeal.

In the case at bar, your petitioner's counsel failed to file a notice of appeal within the requisite ten day period prescribed by Rule 37(a)(2). As a result of his lack of information on the subject, Gilbert Friedman waived this vital right although he lacked the intent to do so. See, e.g., Coppedge v. United States, 369 U. S. 438, 441-42 (1962).

In his recent exhaustive study of this matter,

District Judge Platt noted that a petitioner need not show a non-frivolous appellate issue in order to be relieved of his alleged waiver of appeal. Collins v. United States, 418 F. Supp. 577, 581 (D. C. N. Y. 1976). In fact:-

".....a determination as to the merit or lack of merit in petitioners' appeal is not a question which should concern this Court. Rather, the question is simply whether there has been a frustration of the right to appeal." Id. See, Rodriguez v. United States, 395 U. S. 327, 330 (1969); United States ex rel. Williams v. LaVallee, 487 F. 2d 1006 (2d Cir. 1973), cert. denied, 416 U. S. 916 (1974); United States ex rel Smith v. McMann, 417 F. 2d 648, 654 (2d Cir. 1969), cert. denied, 397 U. S. 925 (1970).

As your petitioner has indicated, the viability of an appeal was never suggested by Mr. Passia (petitioner's trial attorney). In fact, all contact ended with trial counsel, once it became apparent that petitioner could not continue to pay his legal expenses; thus, for lack of trial counsel's federal criminal bar experience, a simple notice of appeal was neglected. Clearly, if the information had been supplied to your petitioner, he would have filed same if merely to protect this important right.

C. Trial Counsel failed to take adequate procedural steps.

As a general rule, a mere disagreement or mistake as to trial tactics utilized by defense counsel does not provide a basis for the relief sought herein. See, e.g., McMann v. Richardson, 397 U. S. 759 (1970). It must be remembered that the:-

"Determination of the effectiveness of counsel cannot be divorced from the factual situation with which he is confronted. When. . . the prosecution has an overwhelming case. . . there is not too much the best defense attorney can do." United States v. Katz, 425 F. 2d 928 (2d Cir. 1970).

But this does not mean that only a cursory performance need be promulgated. Motions should still be made. Investigation must not be neglected. Cf., Massimo v. United States, 331 F. Supp. 519 (D. C. N. Y. 1972), aff'd., 463 F. 2d 1171 (2d Cir. 1972), cert. denied, 409 U. S. 1117 (1973).

In the case at bar, it is questionable as to whether trial counsel had adequate information to reach the conclusion that a plea was necessary. The papers on file in the Federal Courthouse at Foley Square are notably deficient of any motions by trial counsel. This occurred despite the fact that Magistrate C.J. Hartenstine had noted "this complaint fails to show probable cause except by stretching (the) meaning of every word. . ." (see annexed Exhibit C)

Though the lack of motion practice is not enough in and of itself, it reaches a level of greater significance when combined with other facts we shall indicate herein. See, e.g., United States v. Hammonds, 425 F. 2d 597 (D.C. Cir. 1970).

D. Counsel lacked sufficient knowledge to provide effective assistance of counsel.

Admittedly, inexperience of counsel is not enough

in and of itself to procure the relief sought herein. See, e.g., Rastrom v. Robbins, 440 F. 2d 1251 (1st Cir. 1971), cert. denied, 404 U. S. 863 (1971). But, there is a point when mere tactical error is more properly delineated as lack of sufficient assistance of counsel. Cf., United States v. Garguilo, 324 F. 2d 795 (2d Cir. 1963).

In order for counsel to be constitutionally adequate, he must have all the facts before him. There must be reasons for the course taken and these should be quite clear from the record. Otherwise, the trial court was in error to accept the plea. See, e.g., United States v. Moore, 529 F.2d 355 (D. C. Cir. 1976).

In the case at bar, your petitioner was never informed of why a plea was allegedly necessary. Witnesses were never called by Mr. Passim, nor evidence subpoenaed. Possible defenses were never investigated. It is, therefore, incumbent upon this Court to inquire into the basis of trial counsel's tactical solutions for they appear unsubstantiated. See, e.g., People v. Moore, supra. See, also, Cooks v. United States, 461 F. 2d 530 (5th Cir. 1972).

D. Summary.

Thus your petitioner is entitled to the relief sought herein. The proceedings were a farce and a mockery of justice in that:

1. Trial counsel failed to file a notice of appeal or inform petitioner of such;

2. Trial counsel failed to take adequate procedural steps:

3. Trial counsel lacked sufficient knowledge to provide effective assistance of counsel.

POINT III

THE COURT LACKED ADEQUATE AND ACCURATE PRE-SENTENCE INFORMATION IN ORDER TO SENTENCE YOUR PETITIONER.

It is imperative that the sentencing judge approach the subject with an open mind. He should be vigilant for defects in official information presented to him for:

"Misinformation or misunderstanding that is materially untrue. . . as to any facts relevant to sentencing, renders the entire sentencing procedure invalid as a violation of due process." United States v. Malcolm, 432 F. 2d 809 (2d Cir. 1977).
See, also, Briscoe v. United States, 391 F. 2d 984 (D.C. Cir. 1968).

This is an especially important issue in the case at bar since many inaccuracies were presented to this court via the pre-sentence report. Although your petitioner had already sought Rule 35 relief in a motion sworn to the 26th day of October, 1976 (annexed hereto as Exhibit D), a summary of the defects would note, for example, that:

1. Your petitioner was not involved in the sale of drugs for an extended period of time;

2. Your petitioner was going through a very difficult period in his life financially and with respect to his marriage;

3. Your petitioner was in no way a pathological liar or a financial manipulator.

Thus, what the trial judge had before him was a report filled with inaccuracies. When the presentence is wrong, as in the case at bar, the sentence should be vacated. See, e.g., Avery v. United States, 494 F. 2d 33 (5th Cir. 1974), aff'd. 511 F. 2d 1400 (1975).

POINT IV

THESE FACTS WARRANT THE RELIEF SOUGHT HEREIN,
OR, IN THE ALTERNATIVE, A HEARING.

Although these defects are sufficient on their face to warrant the relief so demanded, your petitioner is at least entitled to a hearing. In fact, unless it can be conclusively shown that the defendant's claim is without merit, a hearing on the matter is required. Sanders v. United States, 373 U.S. 1 (1963). See, also, Farbo v. United States, 452 F. 2d 132 (7th Cir. 1971).

SUMMARY

Therefore,

1. Your petitioner's plea was involuntary in nature in that:
 - a. Rule 11 was not complied with;
 - b. He did not understand all the consequences of his plea;
 - c. His guilty plea was coerced.
2. Your petitioner was denied effective assistance of counsel in that:
 - a. Trial counsel failed to file a notice of appeal;
 - b. Trial counsel was lacking in federal bar criminal experience.
3. The Court lacked adequate and accurate pre-sentence information in order to sentence your petitioner.

CONCLUSION

WHEREFORE, your petitioner's guilty plea and resultant sentence should be vacated and dismissed, or a hearing on the matter be established, or such other and further relief be granted to petitioner as this Court deems just, proper and equitable.

Respectfully submitted,

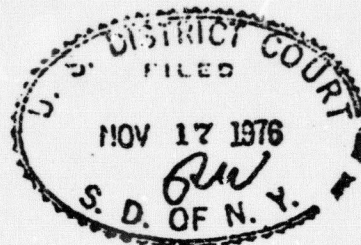
WILLIAM L. FINGER
Attorney for Defendant-Petitioner
Office and P. O. Address
125-10 Queens Boulevard
Kew Gardens, New York 11415
(212) 268-2400

STEPHEN DAVID FINK, ESQ.
On the Brief.

gwsr

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK



UNITED STATES OF AMERICA,

- against -

GILBERT ANDREW FRIEDMAN,

Defendant.

76 Cr. 441

Closed

Before :

HON. KEVIN THOMAS DUFFY,

District Judge.

New York, N. Y.
July 27, 1976 - 2:30 p.m.

A p p e a r a n c e s :

ROBERT B. FISKE, JR., ESQ.,
United States Attorney for the
Southern District of New York;
By: HARRY BATCHELDER, ESQ.,
Assistant United States Attorney.

ALLAN PASSIN, ESQ.,
Attorney for Defendant.

EXHIBIT A

EXHIBIT A

1 gwsr

2

2 THE COURT: 76 Crim. 441, United States v.
3 Gilbert Andrew Friedman.

4 MR. BATCHELDER: The Government is ready, your
5 Honor.

6 MR. PASSIN: The defendant is ready, your Honor.

7 THE COURT: Mr. Friedman, I understand that
8 there is an application to be made on your behalf today.

9 MR. PASSIN: Yes, there is, your Honor.

10 THE COURT: Counselor, what is the application?

11 MR. PASSIN: The application is to be allowed
12 to withdraw the plea of not guilty and to enter a plea
13 of guilty to one count of conspiracy under this indictment.

14 THE COURT: The first count?

15 MR. PASSIN: Yes, sir.

16 THE COURT: Is that right?

17 MR. PASSIN: Yes, sir.

18 THE COURT: Do you wish the first count of
19 the indictment read to you?

20 THE DEFENDANT: No, your Honor.

21 MR. PASSIN: Your Honor, we waive the reading.
22 It has been explained to him.

23 THE COURT: All right.

24 BY THE COURT:

25 Q How do you plead, guilty or not guilty?

1 gwsr

2 A Guilty, your Honor.

3 Q You heard me just tell your co-defendant that
4 I could not accept the plea unless I was convinced that it
5 was voluntary, that you understood your rights and that
6 you understood the consequences of your plea and, in fact,
7 you were guilty. You heard me explain to him that he
8 would have been entitled to a public trial by a judge,
9 a judge and a jury if he persisted in a not guilty plea.

10 Do you understand that? //

11 *ok* A Yes, sir.

12 Q Do you know that at such a trial the Government
13 would have to confront you with witnesses upon whom it
14 relied to make out its case and you would have the right
15 through your counsel to cross-examine those witnesses?

16 A I understand that, your Honor.

17 Q Do you understand that you would be presumed
18 innocent until such time as your guilt was proven beyond
19 a reasonable doubt?

20 A Yes, your Honor.

21 Q Do you know you would be entitled to call your
22 own witnesses at such a trial and, if need be, I would
23 issue orders for those people to show here?

24 A Yes.

25 Q The first count of this indictment basically

1 gwsr

2 charges you with conspiring with your co-defendant and
3 possibly with others to possess with intent to distribute,
4 and/or to distribute, certain schedule 3 narcotic drugs
5 basically valium and amphetamines.

6 Do you understand that, sir?

7 A Excuse me, your Honor?

8 MR. PASSIN: Your Honor, my client explains
9 to me there were no amphetamines at all.

10 THE COURT: As far as he was concerned, but as
11 part of the conspiracy.

12 Q Do you agree it was part of the conspiracy?

13 A There was no amphetamines, your Honor, not to
14 my knowledge.

15 Q But did you know about the valium?

16 A Yes, sir.

17 MR. PASSIN: Yes.

18 Q You know you could go to jail for five years
19 and pay a \$10,000 fine and two years' special parole?

20 Do you understand that?

21 A Yes, your Honor.

22 Q Has anyone made any threats or promises to
23 you to induce you to plead guilty?

24 A No.

25 Q Did anyone make or suggest to you that there

1 gwsr

2 was any understanding with me as to what kind of a sentence
3 you are going to receive?

4 A No, your Honor.

5 Q In fact, did you have possession of these
6 valium?

7 A Yes, I did, your Honor.

8 Q You still wish to plead guilty?

9 A Yes, your Honor.

10 Q Are you personally under the influence of any
11 narcotic drug or even alcohol?

12 A No, your Honor.

13 Q Are you under the care of a psychiatrist or
14 physician presently?

15 A Not at present, your Honor.

16 THE COURT: Counsel, do you know of any reason
17 why a plea of guilty should not be accepted?

18 MR. PASSIN: I know of no reason, your Honor.

19 THE COURT: A plea of guilty will be accepted.
20 I find that it's knowledgeable, voluntary, has a basis
21 in fact.

22 Mr. Passin, do you object to the 7th of
23 September for a sentence date?

24 MR. PASSIN: No objection, your Honor.

25 THE COURT: You don't have a birthday that day,

1 gwsr

2 do you?

3 MR. PASSIN: No. My birthday is in June. It's
4 past.

5 THE COURT: I am not going to ask you how many
6 you have had.

7 All right, September 17 at ten o'clock.

8 Would you be good enough to pick up from the
9 various forms required? Do you know where the Probation
10 Office is, second floor?

11 MR. PASSIN: Yes, your Honor.

12 THE COURT: Okay.

13 MR. PASSIN: Your Honor, my client is under
14 a personal recognizance bond.

15 MR. BATCHELDER: The Government has no objection.

16 THE COURT: All right. Continue the present
17 bail status.

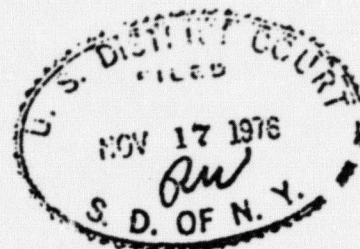
18 MR. PASSIN: Thank you very much, your Honor.

19
20
21 I (We) hereby certify that the foregoing
22 is a true and accurate transcript, to the best
23 of my (our) skill and ability, from my (our)
24 stenographic notes of this proceeding.

25
Official Court Reporter
U. S. District Court

1 mmds

2 UNITED STATES DISTRICT COURT
3 SOUTHERN DISTRICT OF NEW YORK



4 -----x
5 UNITED STATES OF AMERICA, :

6 -vs- :

7 GILBERT ANDREW FRIEDMAN, :
8 a/k/a "CHRIS", :

9 Defendant :

76 Cr. 441

10 -----x
11 B e f o r e :

12 HONORABLE KEVIN THOMAS DUFFY,
13 District Judge

14
15 New York, New York
16 September 17, 1976--10:30 a.m.

17 A P P E A R A N C E S :

18 ROBERT B. FISKE, JR., ESQ.,
19 United States Attorney for the
20 Southern District of New York
21 BY: HARRY C. BATCHELDER, JR., ESQ.,
22 Assistant United States Attorney

23
24 ALLAN PASSIN, ESQ.,
25 Attorney for the Defendant

EXHIBIT B

1 mnds 2

Bl 2 THE CLERK: United States of America vs. Gilbert
3 Andrew Friedman.

4 MR. BATCHELDER: Ready for the government.

5 MR. PASSIN: Ready for the defendant.

6 THE COURT: Have you had a chance to go through
7 the pre-sentence report in the case?

8 MR. PASSIN: I did, your Honor, and in looking
9 at that pre-sentence report, there are certain erroneous
10 things in the statement by reason of the fact that the
11 probation officer didn't have the information available to
12 him. One of the things in particular noted in there is
13 money that is owed to the federal government in the sum
14 of approximately \$12,000.

15 There is a check right now which is in the
16 process of being endorsed, and the government has a lien
17 on that check, a third-party check, in order to satisfy that
18 \$12,000 lien. It will be satisfied to the extent of approxi-
19 mately \$11,000, and Mr. Friedman will only owe \$1,000 on
20 that.

21 As far as the pre-sentence report is concerned,
22 in reading it I find that any involvement that Mr. Friedman
23 had in relation to monies was all involved in his business.
24 Nothing came about or was involved prior to him going into
25 this business that he was in at the time, which was Medicare

1 mmds 3

2 centers. Rents had to be paid, expenses; monies were needed,
3 and, unfortunately, it drained him personally, and he had
4 to borrow money not only from his parents, but from his
5 wife in order to salvage something from it. He had put a
6 lot of his own money into it. What he did was wrong, no
7 question about it. The manner in which he went about it
8 in order to try to salvage this business was wrong. He
9 didn't do it for his own personal gain, except in the long
10 run on something which he himself was building and working
11 on.

12 Before that time, your Honor, if you read the
13 report, he himself worked. He worked for many, many years.
14 He supported himself; he didn't rely on anyone to support
15 him. He has put himself through school. And in reading
16 that report, everything seems to be hinged on this one money
17 problem, and it seems to indicate that this always has been
18 his way of life. It has not been his way of life.

19 He has always worked for a living. The one
20 time he went into business, unfortunately, things started
21 to go bad for him, including maybe even paying too much for
22 a business which didn't pay the kind of money that he thought
23 he would be getting the returns from.

24 In reading that pre-sentence report and some
25 of the other things involved, I feel that Mr. Friedman

1 mmds 4

2 really is not a candidate for incarceration. What he did
3 was wrong; he feels badly about it. He went about things
4 in a wrong manner, and I ask your Honor to extend some
5 feeling and mercy in this situation, and not incarcerate
6 him. I think that he has learned enough from this experience
7 so it can never happen again.

8 He has never been involved with the law prior
9 to this, and I am sure that after this situation he will
10 never be involved again.

11 THE COURT: Mr. Friedman, do you have anything
12 to say for yourself?

13 THE DEFENDANT: Yes, your Honor.

14 I have made a statement, prepared a statement,
15 if it is okay. I would like to read it.

16 THE COURT: Sure.

17 THE DEFENDANT: Your Honor, I am 29 years old.
18 Since the age of 18 years I have been self-sufficient and
19 independent of my parents. I have held various financial
20 management positions, the last two being assistant controller
21 of a New York Stock Exchange company and assistant treasurer
22 of an American Stock Exchange company.

23 Up until this unfortunately incident I have
24 never committed a crime. In 1974 I reached a cross-roads
25 in my life, and although I was financially successful, I did

1 mmds 5

2 not have a feeling of success as I saw it. I wanted to get
3 more involved in social and community affairs and yet make
4 a good living for myself and my family.

5 I finally found a business I thought could
6 satisfy these needs, which was the operation of Medicaid
7 facilities in high income areas. For the first time in
8 my life I borrowed money from my parents, and, in addition,
9 I liquidate myself of all personal assets and asked my
10 girl friend to borrow \$1500 to sustain us while I tried to
11 operate this business.

12 Unfortunately, after a fire occurred in March
13 of 1975, I was unable to reestablish the business to the
14 position it was in before, and in desperation I borrowed
15 further money from my father-in-law so I could continue
16 in business. It was during that time I was also suffering
17 marital problems. I lost my wife first. During my separation
18 I was trying to get my business in order and my wife to
19 reconcile our differences.

20 Unfortunately, I got involved in a one-shot
21 situation to purchase these pills. I swear I never have
22 bought pills since or before that one time. I admit to be-
23 ing reckless and irresponsible in committing this crime,
24 but I love my work and I love my wife and I ignored the
25 risks. I regret this being in jail; I regret being arrested

1 mmds 6

2 in front of my friends and neighbors; I regret being finger-
3 printed. I have to live with this criminal record for the
4 rest of my life. This is not the atmosphere I have been
5 used to in the first 28 years of my life.

6 I feel I am an adult; I feel with the therapy
7 I have received from my psychiatrist and with the support
8 of my friends and family I am not capable, nor will I ever
9 put myself in a position where I have to commit a crime to
10 alleviate a personal problem, no matter how grave the
11 situation. There is no reward large enough to expose my-
12 self to a situation like that.

B2 13 I ask for forgiveness in front of God and this
14 Court and ask to show me mercy and not let me spend time
15 in jail and let me go out and be the citizen I was capable
16 of being again.

17 THE COURT: It is the judgment of the Court
18 that the defendant, Gilbert Andrew Friedman, be remanded
19 to the custody of the Attorney General for a period of not
20 to exceed three years, after which he is to serve a special
21 parole term of three years. Contrary to the recommendation
22 of the Probation Department, I do not see that this is an
23 appropriate case for a fine.

24 MR. BATCHELDER: There are open counts --

25 THE COURT: I said remanded to the custody of

1 mnds 7

2 the Attorney General for a period of three years, all counts
3 to run concurrently.

4 (Recess)

5 MR. PASSIN: I would like to apply to the Court
6 for a delay in the surrender for two weeks for Mr. Friedman
7 to wind up his affairs.

8 MR. BATCHELDER: The government has no objec-
9 tion.

10 THE COURT: Yes.

11 MR. BATCHELDER: And that date is, sir?

12 THE COURT: It is two weeks from today, what-
13 ever that is.

14 MR. BATCHELDER: Your Honor, Counts 2, 3 and 5
15 are outstanding, and I understand your Honor has dismissed
16 them, but I just want the record to indicate that.

17 THE COURT: Yes.

18 It is October 1st.

19 MR. BATCHELDER: Thank you.

20
21 I (We) hereby certify that the foregoing
22 is a true and accurate transcript to the best
23 of my (our) skill and ability from my (our)
24 stenographic notes of this proceeding.

25
Michel Martinez

Official Court Reporter
U. S. District Court

DEFENDANT'S NOTICE OF MOTION WITH
MEMO ENDORSED, DATED OCT. 29, 1976

A-75

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v.

GILBERT FRIEDMAN

:

76 CR 441

:

KTD

:

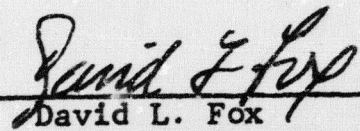
NOTICE OF MOTION

S I R :

PLEASE TAKE NOTICE that defendant Gilbert Friedman
will move this Court on Friday October 29, 1976 at 10:00 A.M.
at the United States District Courthouse, Foley Square, New York,
New York for an Order, suspending the sentence heretofore imposed
against Gilbert Friedman, or, alternatively reducing said sentence,
and for such other and further relief as the Court deems just and
proper.

Dated: New York, New York
October 26, 1976

Yours, etc.



David L. Fox
Attorney for Defendant
600 Madison Avenue
New York, New York 10022
(212) 751-1550

TO:

CLERK'S OFFICE
United States District Court
Southern District of New York

ROBERT FISKE, ESQ.
United States Attorney
Southern District of New York
Attention: Harry Batchelder, Esq.
Assistant U.S. Attorney

6

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

UNITED STATES OF AMERICA,	:	
	:	76 CR 441
Plaintiff,	:	KTD
	:	
-against-	:	AFFIDAVIT
	:	
GILBERT FRIEDMAN,	:	
	:	
Defendant.	:	

-----X

GILBERT FRIEDMAN, being duly sworn, deposes and says:

I, the defendant in the above matter, make this affidavit in support of my motion, pursuant to 18 USC 3651 and Rule 35 of the Federal Rules of Criminal Procedure, for an Order:

1. directing that the sentence heretofore imposed on me by the Court be suspended and that a period of probation be imposed, or that the sentence heretofore imposed be reduced to a term in keeping with the facts herein.

2. directing that the date set for my surrender herein, be postponed until the Court has ruled on this application, because I am advised that should my surrender take place before the Court reaches its determination, the Court will lack jurisdiction to grant probation (18 USC 3651).

The Court has not announced its reasons for sentencing me, a first offender to a three (3) years prison term, while my co-defendant, Alan Gassberg received a sentence of probation. However, I believe that the severity of my sentence and the disparity in our sentence was caused by certain statements and insinuations in the pre-sentence report. I will, in large part address myself to these errors. In addition, I will refer the Court to certain additional information, which was not previously brought to the Court's attention on my behalf.

1. The Sentence Report

Perhaps most important, I understand that the pre-sentence report gave the impression that Mr. Gassberg and I had been involved in sales of Schedule III drugs for an extended period of time, selling 10-20,000 barbiturates weekly. This is not true. I was not advised of this statement prior to my sentencing, or I would have refuted it then. Attached hereto as Exhibit "A" is a letter from Mr. Chris Anicich, explaining that I first met Mr. Gassberg no more than 3 weeks before the crimes charges herein were committed. In addition, attached as Exhibit "B" is a letter from Mr. Gassberg confirming that we had never met previously. In addition, the facts show that I only had approximately 17,000 pills and of these many over 80% were non-barbiturates. (See the government's chemist report).

I submit to the Court that I was never, until I was beset with marital and financial problems far beyond my ability to cope, involved in any illegal activity prior to those alleged in the indictments. Exhibit "B", the letter from Alan Gassberg, confirms that I said as much to him during the time period described in the indictment. My wife confirmed this statement to my probation officer.

The Court must understand the sequence of events. I started my own businesses at age 27 in March 1974, largely on funds borrowed from my parents. Prior to that time, I had been fairly successful as an accounting executive. In June 1974, 3 months after starting my businesses, I married Andrea Ackerman. I had been married twice before. Andrea knew about both these marriages before she married me. I was committed to finally making this marriage work and to be an independent, successful business man.

Fifteen months later, I had gone from commitment to panic and despair. My businesses were insolvent, the money I'd borrowed was gone, and my wife deserted me due to the financial and social pressures put upon the marriage. I panicked.

On November 26, 1975, 16 days after I met Gassberg, and one month after my wife left me, I went to see a psychiatrist, Ian Alger, M.D., in connection with depression and anxiety resulting

from my marital separation and the failure of my businesses. A copy of Dr. Alger's letter to the Court is attached as Exhibit "C". During the next twenty days I was involved in the conduct of which I stand convicted. I bring this sequence of events to the Court's attention because it highlights my emotional and mental condition at the time these crimes were committed. I had never committed a crime before and had never seen a psychiatrist before; I had never before needed such help.

The point I am trying to make is that the government's agents were wrong in believing an informant's statements (a) that I had been involved in illegal transactions for an extended period of time prior to these offenses, or (b) that I had supplies other than those I sold and surrendered to them. In fact, the informer falsely claimed to have met me, but never did. Similarly, the government's refusal to acknowledge that I cooperated with it is incomprehensible. I did give the government agents all the information I had. I could give them no more, because I had not been involved in any other criminal activity. Apparently, the pre-sentence report also emphasized my outstanding debts in reaching its unfavorable recommendation. My attorney has advised me that the report calls me a "financial manipulator". I can account for all monies I received. I can prove that all insurance proceeds were used to repair fire damage.

I can prove that the fire caused the demise of my business. What the report fails to mention is that all of my debts, whether they are a medical bill, alimony or loans, were incurred during 1974 to 1976, the period in which my businesses were dying. Prior to 1974, I had no such financial problems, whatsoever nor are any mentioned in the pre-sentence report.

I fully intend to pay those debts as soon as I can. In fact, I have been offered a job as a controller by Magna Distributing Corp., which would enable me to begin repayment immediately. A letter from Magna confirming this offer is attached as Exhibit "D".

In addition to the errors mentioned above, I believe the few business and social acquaintances interviewed gave the investigators responsible for the pre-sentence report an erroneous impression of me. There is little doubt that my wife Andrea is furious with me. I have, in the past few weeks, asked her to supply the court with a letter simply stating the truth as she knows it. She refused to cooperate at all. Then her lawyer advised me, through my lawyer, that she would consider cooperating only after I had paid my debts to Andrea and her parents.

In the hope of providing the Court with a more accurate description of me, I have obtained a number of favorable letters from business and personal acquaintances. There are attached as Exhibits "E" through "H", inclusive.

Exhibit "E" is a letter from my next door neighbor and close friend, Nicholas B. Angell, a partner in the New York law firm of Chadbourne, Parke, Whiteside & Woolf. As Nick says in his letter, he and his wife saw Andrea and me weekly from January 1974 to September-October 1975. Gaining the friendship of people like Nick and his family during 1974 reflects favorably on my character and personality. Nick saw me in 1975 as my business and marriage deteriorated. He saw how desperate I was financially and the emotional strain I was under. He has also seen the impact my criminal activity, the arrest and sentence have had upon me.

Another letter, from the Very Reverend Dominick Pistella (Exhibit "F") should fully establish that my medical centers were of value to the community. My centers gave free T.B. examinations to all who wanted them. On occasion, and paying the costs out of my own pocket, I directed my staff to give free examinations and treatment to persons who could not pay and were not Medicaid qualified. As Reverend Pistella states I ran a free Tuberculosis Information Booth in July 1975 at his Church in East Harlem.

I also caused my clinics to participate in the "WIN" program, providing jobs at these clinics to unemployed people recommended to me by the New York State Department of Labor. Attached as Exhibit "G" is a letter from the Department of Labor's On the Job Training Office ("OJT") commending me for participating in that program. I gave of my time and experience to "Project

Return" a drug rehabilitation program on East 52nd Street, where I tutored some of the residents in bookkeeping.

These letters, of course, are all in addition to the numerous favorable letters which were submitted to the Court prior to the imposition of sentence.

2. My Physical and Mental Condition

Dr. Alger's letter, (Exhibit "C") describes how the anxiety I've felt concerning my present situation has caused me to suffer from bronchial asthmatic attacks, which I have not had since I was an infant. On October 6, October 7, and October 11, 1976 I was given emergency treatment at The New York Hospital, 525 East 68th Street, New York, New York when the asthma became so severe that I literally could not breathe. Attached hereto as Exhibit "H" is a copy of the hospital record concerning that treatment. I am still being treated for this condition and have consulted Dr. Stephen Fredd of Bellvue Hospital, an internist, who has referred me to a pulmonary specialist. I have an appointment with Dr. Fredd on October 27 and with the pulmonary specialist, Dr. J. P. Smith, 170 E. 77th Street, New York, New York on October 29, 1976.

I do not bring this to the Court's attention for the purpose of relying on my illness as a basis for a reduction in my sentence. My purpose is to show the Court that my remorse, as well as my anxiety and depression concerning the crime I committed, my personal and business relationships and my impending imprisonment, are real and not feigned.

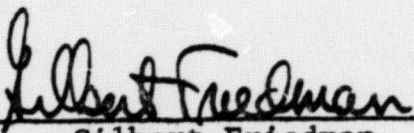
The crime of which I stand convicted was a stupid, selfish and desperate act. I may have endangered a number of people to dangerous substances, for the sole reason of saving my businesses and my marriage. In my desperation, in addition to losing my wife and my businesses, I've lost my reputation among the people I sought to serve and my own self respect.

Should the Court now suspend its sentence and place me on probation, I will do everything I can to make full and complete restitution. Perhaps if the Court believes it appropriate, such restitution could be made a condition of my probation. If I am denied such relief, my creditors will have no recourse but to await my return from prison to collect what I owe.

The Court should have no question that I have learned a hard and bitter lesson. When I compare the sentence imposed upon me with that imposed upon my co-defendant, I realize the disastrous initial impression the Court has had of me. It is my hope that the evidence submitted with this application has corrected that impression.

I have been seeking to obtain further documentation for the Court of the good reputation I established among the residents of the communities in which my clinics were located. However, as I sign this Affidavit, I have not yet received those items. I respectfully request that the Court take into its consideration those documents which may hereafter be submitted on my behalf.

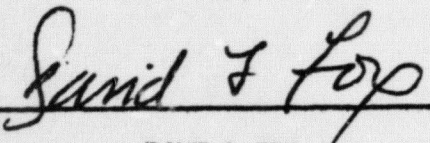
WHEREFORE, your deponent respectfully requests that the Court suspend the sentence heretofore imposed and that a period of probation be imposed, or, alternatively that said sentence be reduced, and for such other and further relief as the Court deems just and proper.



Gilbert Friedman

Sworn to before me the

26th day of October, 1976.



DAVID L. FOX
Notary Public, State of New York
My Comm. Expires 12/31/77
JAN 10 1977

Chris Anicich
231 East 52nd Street
New York, N.Y.

September 29, 1976

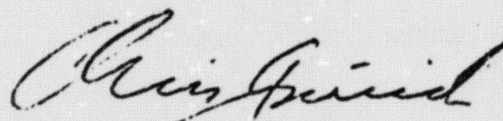
Mr. Jack Lipson
Federal Defender Services Unit
U.S. Court House Room 354
Foley Square, New York 10017

Dear Mr. Lipson,

I understand that a question has arisen concerning the length of time that Allan Gassberg and Gil Friedman have known one another. I am writing to confirm to you that I first introduced Allan Gassberg to Gil Friedman on November 10th, 1975 and that it is my understanding from the circumstances of that introduction that the two men had not known one another prior to that occasion.

If you have any further questions concerning this matter, please feel free to contact me at 371-7821.

Very truly yours,


Chris Anicich

October 20, 1975

DAVID,
IF you'll have your gal type the
following letter, I'll be glad to
sign:

DAVID L. FOX
600 MADISON AVE
New York 10022

DEAR DAVID:

I would like to here avow
that I first ~~met~~ met Gilbert
FRIEDMAN on November 10, 1975. During
the course of our discussions he
stated to me that, 'this is the
first time that he is participating
in a transaction of this kind.'

I never heard of him being
involved in ~~any~~ other activities of
this nature.

ALAN GASSBERG

October 11, 1976

The Honorable Judge Kevin T. Duffy
U.S. District Court
Foley Square, N.Y.

RE: Gilbert Andrew FRIEDMAN

Dear Judge Duffy:

I am writing at the request of, and with the authorization of Mr. Gilbert Friedman. Mr. Friedman was first seen in psychiatric consultation by me on November 26, 1975 regarding anxiety and depression concerning his recent marital separation, and also in relationship to the dissolution of his business.

He was seen in psychotherapy by me regarding these anxiety and depressive states approximately once a week for approximately six months, with his final visit at that time on June 15, 1976. At the time of discontinuation Mr. Friedman was under considerable anxiety and depression related to his personal relationships, and to his business difficulties.

Today, October 11, 1976, I saw him again in urgent consultation for his anxiety related to a recent attack of asthma in the early morning hours of October 6, 1976. He reported that following his appearance in court on October 1, 1976 he began to develop symptoms of asthma which had been common in early childhood, but had in recent years not been present. As the symptoms increased over the next few days he experienced greater difficulty in breathing until he went on October 6 to the emergency room at New York Hospital, where he was given emergency care, and also given prescriptions for medication to relieve the acute asthmatic symptoms, and to reduce the attendant anxiety.

He now plans to continue further medical treatment since some asthmatic symptoms remain, and the original medication has been used. I believe that the impending jail sentence has immediately contributed to the recurrence of this earlier condition, and believe further that the asthmatic condition is related to underlying neurotic pathology which might respond to psychotherapeutic intervention.

Mr. Friedman is willing to undergo psychiatric treatment at this time, and I believe such therapy would also contribute to his rehabilitation and to his gaining relief from his current asthmatic potential which seems causally related to his present anxiety situation.

Yours truly,

IEA:s

cc: Mr. D. Fox

Ian Alger, M.D., Q.P., F.A.P.A.

Magna Distributing Corp.

EXECUTIVE OFFICES
10 EAST 40TH STREET
NEW YORK, N. Y. 10016
(212) 685-2700

Mr. David L. Fox
600 Madison Avenue
New York, New York 10021

October 20, 1976

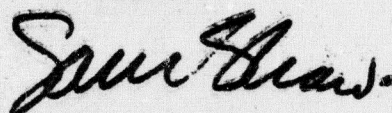
Dear Sir:

I have interviewed Mr. Gilbert Friedman for an opening in our film distribution company, Magna and find him suited for our growing film company.

We are currently distributing three of the most prestigious art films, "Solaris" now playing at the Ziegfield Theatre in New York, Alan Resnais' "Stavisky" and soon to be released "Eric and Olga" the Dutch film that has also been acclaimed in Europe and has been nominated for an Academy Award.

Judging by references from mutual friends, his personality and work dedication plus an ideal resume, we feel he would be a major compliment to our new company in the capacity of controller, and have offered him this position.

Hoping for compassionate
consideration for an
unfortunate occurrence,
I remain



Sam Shaw creating director
Magna Distributing Corp.

30 Rockefeller Plaza
New York, N.Y. 10020

September 30, 1976

David L. Fox, Esq.
600 Madison Avenue
New York, New York 10022

Dear Mr. Fox:

As you know, I am a partner with the law firm of Chadbourne, Parke, Whiteside & Wolff, 30 Rockefeller Plaza, New York City, and have been a friend of Mr. Gil Friedman since January 1974. I understand that Mr. Friedman was arrested in December 1975 on a charge relating to narcotics in some way and that, having pleaded guilty, recently was sentenced by Judge Kevin Duffy to a three-year term in jail to commence tomorrow. I further understand that you represent Mr. Friedman in connection with this matter and this is to confirm that you have requested me to provide you with a letter describing my relationship with Mr. Friedman and my opinion concerning the young man.

My wife and I formerly resided at 301 East 48th Street and in January 1974 we moved from one apartment to another apartment in the same building. Mr. Friedman and his wife moved into our old apartment and in that manner we became acquainted and then friends. As "next door neighbors" we saw Mr. Friedman and his wife quite frequently during the period January 1974 through September - October 1975, probably on a weekly basis. Mr. Friedman and his wife had only recently been married when we first knew them. During the first year of our relationship with the Friedmans they were happily married and Mr. Friedman's business seemed to be going very well. In 1975 with the deterioration of New York City's financial condition Mr. Friedman's business was adversely affected and during the first nine months of that year we observed Mr. Friedman coming under heavy strain because of the failing condition of his businesses and, at the same time, their marriage started to deteriorate. During that period, probably because of the increasingly poor condition of their marriage relationship, we saw somewhat less of the Friedmans. Clearly, however, the pressure built on Mr. Friedman and he was not acting in as stable or normal a manner as when we first met him. Although I am not clear

David L. Fox, Esq.

-2-

September 30, 1976

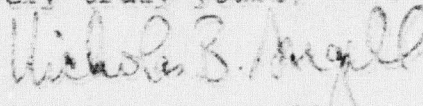
on the facts, I believe the businesses failed some time during 1975 and that the Friedmans were under severe financial pressure. In September and October of 1975 their marriage completely disintegrated, although I am not clear that a formal separation or divorce took place.

I did not learn of the facts relating to Mr. Friedman's arrest in December 1975 until last week. Although, of course, I was shocked at this development, it immediately occurred to me that Mr. Friedman, a young man who had apparently attempted to reach for achievements which he could not sustain, had come under tremendous emotional and financial pressure in 1975 and that probably because of this pressure had been tempted into abnormal activity which led to his criminal act.

Although I do not practice law in the criminal area, it seems to me relevant for a court to take these circumstances into account. Based on my conversation with Mr. Friedman last week and also some occasional conversations I have had with him earlier this year, it is clear that his arrest and sentencing have been an enormous shock to him, which is certainly understandable. I believe these developments have deeply shamed him and will rock him into a much stronger sense of perspective and balance and with his education and some very good qualities of character that he has I believe that he will be able to rehabilitate himself and conduct himself as a proper citizen in the future.

I hope that this letter serves some useful purpose for Judge Duffy and may result in presenting Judge Duffy with some additional, balancing circumstances.

Very truly yours,


Nicholas B. Angell

By Hand

SOCIETAS APOSTOLATUS CATHOLICI (PALLOTTINI)

PROVINCIA REGINÆ APOSTOLORUM (ITALO-AMERICANA)

ROMA - VIA GIUSEPPE FERRARI, 1

NEW YORK (29), N.Y., 448 EAST 116TH STREET

October 11, 1976

To whom it may concern:

I am writing on behalf of Mr. Hubert Friedman asking your gracious assistance in his present difficulty.

I am the Very Rev. Domenic J. Pistella, formerly the Pastor of Our Lady of Mount Carmel church in New York City, at 448 E. 116 St. and presently the Provincial Superior of my Order, with residence, for my term, in Rome Italy.

I remember Mr. Friedman very distinctly as he organized the medical center in the neighborhood and also provided precious assistance to the poor of the district; in particular he organized and personally directed the Tuberculosis information and display booth in connection with the annual fiesta of Our Lady of Mount Carmel during July of 1975. I have a very fond recollection of his dedication and kindness to the people of the community on that occasion as in others.

Whatever consideration may be given this case will be highly appreciated by Mr. Friedman and myself.

Sincerely yours

V. Rev. Domenic J. Pistella, Provincial
former Pastor at Mount Carmel

Domenic J. Pistella f.a.e.

Central OJT Office
2 World Trade Center-Room 5383
New York, New York 10047

September 12, 1975

Mr. Gilbert Friedman, President
GAME ENTERPRISES CORP. #2
331 East 115th Street
New York, New York 10029

Dear Mr. Friedman:

Enclosed is your copy of your recently submitted On-The-Job-Training proposal.

Please note the contract termination clauses included in Part II, Section IX and Section XVII of the General Provisions. These clauses permit either party to this contract to terminate the contract after due notification of such intention to the other party.

Your interest in providing the skill training necessary to create new work opportunities is commendable. The New York State Department of Labor is delighted to cooperate with you in this worthwhile endeavor.

Please feel free to call upon us for further assistance in providing training opportunities.

Sincerely yours,

Joseph P. Flynn
Sr. OJT Specialist

JPF/mh
Encl.

A-93
G. Friedman
G. 11

THE NEW YORK HOSPITAL

Chartered 1771

525 EAST SIXTY-EIGHTH STREET
NEW YORK, N.Y., 10021



10-11-76

Gilbert Friedman
301 E. 48th St.
N.Y.C.

Record: 150 28 86

David L. Fox
Attorney At Law
100 Madison Avenue
New York, N.Y. 10022

Dear Sir:

In reply to your correspondence of 10-8-76, please refer to
paragraph number 1 below.

The information you have requested is enclosed.

This patient was admitted to The New York Hospital on _____.
Upon his/her discharge the information requested will be forwarded.

A consent form for the release of the information is required.
A copy of this form is attached. If the patient is a minor, the
consent form must be completed by a parent or guardian.

The fee for the requested information is \$_____. The
information will be forwarded upon receipt of your check,
payable to The New York Hospital.

The medical record pertaining to this patient has been temporarily
misplaced. As soon as it has been located, we will be in touch
with you.

Very truly yours,

Maureen Felumero
Medical Information Unit
F-138 Telephone: 472 6100

Enc: Our bill for \$15.00

DATE 10/6/76 LOCATION U.S. 20 SERVICE Freshman, Gilbert
 ADDRESS _____
 (PRI. AMB. ONLY)
 AGE 40 M ☒ F ☐ PREVIOUS FILMS NYH ☐ YES ☒ NO YEAR _____ ☐ PORT.

Freshman, Gilbert
 A-94
150 28 86

EXAMINATION(S): DESIRED ☒ CHEST ☐ IVP ☐ BE ☐ GB ☐ META SERIES
☐ RIBS ☐ SKULL ☐ GI ☐ TIB-FIB ☐ ABD FL PLATE
☐ ANKLE ☐ FOOT ☐ HIP ☐ SHOULDER ☐ CERVICAL-SP
☐ HAND ☐ WRIST ☐ KNEE ☐ CYSTOGRAM ☐ SPINE 2-SEC

OTHER: PA: lateral

CLINICAL DATA: asthma - diffuse wheezing 5 notes
R/O pneumonia

DATE PERFORMED: _____ (TO BE COMPLETED BY RADIOLOGY DEPT.) ☐ WORKMEN'S COMPENSATION PLEASE PRINT NAME W.S. Smith M.D.

RADIOLOGY REPORT

- ☐ NO SIGNIFICANT ABNORMALITIES
☐ NO CHANGE SINCE: _____ Date _____
☐ REPORT OF FINDINGS:

DATE REPORTED: _____

Chest PA and lateral.

The mediastinal and cardiac silhouettes are normal. No infiltrates or effusions.

DR. RIETH/R 10-7-76

HISTORY NO. _____
 EMERGENCY
 DO NOT FOLD OR SEND TO USE IMPRINTER AND/OR BALL POINT PEN ONLY.

RADIOLOGIST

DEPARTMENT OF RADIOLOGY

A-95

DATE (MO., DY., YR.)

LOCATION

001 SERVICE

Friedman, G. J. / Ker
150 28 86

DOCTOR

IF NO PLATE, PRINT NAME, SEX, AND HISTORY NO.

HEMATOLOGY

BLOOD GROUP

RH

(Top Edge - Attach Laboratory Reports In Date Order)

DATE 10/6/76 BY WH
THE NEW YORK HOSPITAL LAB. NO. 270
150 31ADDRESS
(PRIV. AMB. ONLY)

DATE OF SPECIMEN

LOCATION

SERVICE

DATE
TEST NO.
CBC DIFF.
NORMAL ADULT
COULTER'S VALUES

BILL

PAID

CHANGE

WBC M 7.8 ± 3
X 103 F 7.8 ± 3RBC M 5.4 ± 7
X 106 F 4.8 ± 6HGB M 16 ± 2
g/dl F 14 ± 2HCT M 47 ± 5
% F 42 ± 5MCV M 87 ± 7
fl F 90 ± 9MCH M 29 ± 2
pg F 29 ± 2MCHC M 34 ± 2
% F 34 ± 2Right
Edge
of
2nd
Report
→Right
Edge
of
3rd
Report
→Right
Edge
of
4th
Report
→Right
Edge
of
5th
Report
→

DIFF. AND SMEAR DESCRIP.

33 LYMPH %
ATYP. LYMPH
3 MONOCYTE
5 EOSINOPHILE
5 BASOPHILE
5 POLYMORPH.
HANDS
METAMYELO.
MYELOCYTE
PROMYELO.
BLASTS
UNCLASS.
NUC. RBC/100
WBC
ANISO. re
POIK.
POLYCHROM.
STIPPLING
TOXIC GRAN
OTHER COMMENTS

10 9 10 LB EMERG. CO2
150 28 86
Friedman, G. J. / Ker

CHART COPY

Other Comments (Include Date):

2335
EMERGENCY ROOM RECORD

Friedman, Albert

A-96

150 28 84

29

Dr Arnold

IF NO PLATE, PRINT NAME, SEX, AND HISTORY NO.

DATE & TIME OF ARRIVAL IN EMERGENCY ROOM:

OCT 6 12 38 AM '78

Asthma

Epi 0.3 cc SQ 1 AM

DATE AND TIME OF ONSET:

COMPLAINT AS STATED BY PATIENT:

OBSERVATIONS: TIME:

A.M.
P.M.

TEMP: 37.6

PULSE: 84

RESP: 33

B.P.: 130/80

HISTORY & PHYSICAL EXAMINATION, LABORATORY & X-RAY FINDINGS, TREATMENT & MEDICATION:

29 yr old male in excellent health most of his life - except childhood asthma. For ~3 days has had URI symptoms - dry, spasmless cough. No fever. Has had a feeling of chest constriction & SOB x 2 days aided by Primidone & Bronkitolol somewhat yesterday only to return today after an argument.

PE VS above

Chest - bilateral diffuse wheezes predom. expiratory - in lower lobes
0 rales or rhonchi I:E = 1:2

C-Vase - wls, S₂ 0 S₃ or S₄

HEENT - WNL & 1 pharyngeal injection (Over)

IMPRESSION/DIAGNOSIS: Asthma

CONDITION OF PATIENT ON DISCHARGE OR TRANSFER: Stable

DISPOSITION OF CASE: Home

INSTRUCTIONS TO PATIENT: ~~Return PRN~~ Return PRN

② Chalcidyl Elixir ii teaspoons po QID

③ Terbutaline 250mg po QID x 10 days

④ Alupres Mistometer ii inhalations prn QID

⑤ Valium 2mg po QID W.S. Arnold M.D.

PERSON TO WHOM INSTRUCTIONS GIVEN: Dr. Arnold #70

PHYSICIAN'S SIGNATURE

DATE:

TIME:

A.M.
P.M.

⑥ Epinephrine 1:1000 0.3 cc SQ

NURSE'S SIGNATURE

S.C. NOW before he leaves

THE NEW YORK HOSPITAL

EMERGENCY ROOM RECORD

LB16

EMERGENCY ROOM RECORD

Friedman Gilbert

150 28 86

IF NO PLATE, PRINT NAME, SEX, AND HISTORY NO.

29 DR Arnold

DATE & TIME OF ARRIVAL IN EMERGENCY

Oct 8 10:15 PM '76

Asthma

DATE AND TIME OF ONSET:

COMPLAINT AS STATED BY PATIENT:

Was seen in E.R. last night

OBSERVATIONS: TIME: 10:15 A.M. TEMP: 36.4 PULSE: 100 RESP.: 22 B.P.: 110/70

HISTORY & PHYSICAL EXAMINATION, LABORATORY & X-RAY FINDINGS, TREATMENT & MEDICATION:

29 yr old ♂ asthma - see my note of last night. Anxious; thinks this adds to asthma. Now ♂ notes but again ♂ wheezes; I:E = 1:2 ♂ subjective SOB. Will Rx ♂ epinephrine, aminophylline and hydration.

11:45 PM - asleep in NAD

aminophylline running in

12 MN - asleep still; RR 30

This anxiety is largely due to the fact he is to start a 3 year sentence in jail for being caught with 10,000 valium pills in his possession.

1 AM: I:E = 1:2 ♂ very few wheezes → given another epi (Over)

IMPRESSION/DIAGNOSIS: Asthma, mild

CONDITION OF PATIENT ON DISCHARGE OR TRANSFER: Stable

DISPOSITION OF CASE: Home

INSTRUCTIONS TO PATIENT: Continue previous meds

0.3 cc 1:1000 epinephrine

350 mg aminophylline in 20 cc solution @ 10:50 pm RT.

400 mg aminophylline in 500 cc D₅W over 6 hrs @ 11:30 PM

Chlorbutol 4 mg po

PHYSICIAN'S SIGNATURE

M.D.

PERSON TO WHOM INSTRUCTIONS GIVEN:

DATE: 10/7/76

TIME: 1:15 A.M.

K Armstrong RN

		L	M	S	Base	Poly	Barrel
WBC	10,900	33	3	7	1	55	1
High	16.5						
Heat	45.6						

27 11 01 31 1 00

2 AM - 3 whynes

I:E = 1:1

Discharge -

5/1/20

ENDORSEMENT
76 Cr. 441

The defendant through his attorney moves under Rule 35, Fed. R. Crim. Pro., to reduce or modify the sentence imposed upon him. He further moves for an additional postponement of surrender date.

Upon consideration of the affidavit of the defendant and the exhibits thereto, the motion is denied.

SO ORDERED.

New York, New York
October , 1976

Alvin Thomas
U.S.D.J.

MICROFILM

OCT 29 1976

GOVERNMENT'S MEMORANDUM OF LAW IN
OPPOSITION TO MOTION TO DISMISS

A-100

RKN:jrs
3-1969

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- -x
UNITED STATES OF AMERICA, :

-v- :

76 Cr. 441 (KTD)

GILBERT ANDREW FRIEDMAN, :
a/k/a "Chris", :

Defendant. :
----- -x

GOVERNMENT'S MEMORANDUM OF LAW
IN OPPOSITION TO DEFENDANT'S
MOTION TO WITHDRAW HIS GUILTY
PLEA AND SET ASIDE THE JUDGMENT
OF CONVICTION

Preliminary Statement

Gilbert Andrew Friedman, a/k/a "Chris", has moved under Rule 32(d) of the Federal Rules of Criminal Procedure, or alternatively for a writ of error coram nobis, to withdraw his plea of guilty to violations of the federal narcotics laws and to vacate his sentence and the judgment entered thereon. Friedman further requests an evidentiary hearing.

Indictment 76 Cr. 441, filed April 29, 1976, charged Gilbert Andrew Friedman and Alan Lester Gassberg with conspiracy to distribute and possession of with intent

to distribute a Schedule III controlled substances in violation of Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(B). Three other counts, of knowing distribution of such controlled substances and possession with intent to distribute, were alleged against Friedman, two of them jointly with Gassberg.

On July 27, 1976, both defendants presented themselves before this court and substituted their prior not guilty pleas with pleas of guilty to the conspiracy count. Friedman received a sentence of three years incarceration and an additional three years of special parole on September 17, 1976. He is currently serving his term. Gassberg was placed on probation on October 15, 1976. All other counts were dismissed.

Friedman makes this motion based on the plea proceedings, claiming a denial of due process. He argues that the guilty plea was involuntary as the Court allegedly did not explain the nature of the crime pled to, the full consequences of the plea, nor establish a factual basis for his guilt. Further, he claims his plea was coerced due to the ineffective assistance of his counsel. Lastly, Friedman argues that the sentence was improperly imposed as a result of an inaccurate pre-sentence report.

s
9

The Government believes that all of these contentions are without merit and that the requested relief should be denied.

ARGUMENT

- I. There has been no violation of Rule 11 sufficient to render Friedman's guilty plea involuntary

The general test for determining the constitutional validity of a guilty plea remains whether the plea represents a voluntary and intelligent choice among alternative courses of action. North Carolina v. Alford, 400 U.S. 25, 31 (1970); Kelleher v. Henderson, 531 F.2d 78 (2d Cir. 1976). The duty of the Court accepting the plea, as recently stated concisely by the Second Circuit, requires it to

"satisfy itself that the defendant is offering the plea voluntarily and that he is competent to understand the nature of the charge, his constitutional rights, and the scope of the penalty provided by law." (citations omitted) Saddler v. United States, 531 F.2d 83, 85 (2d Cir. 1976).

As will be developed, this Court had before it sufficient information to so satisfy itself, and the record is insufficient to support a claim that the plea was involuntary and not comprehended by Friedman.

A. Friedman understood the nature of the charge

Friedman claims, in part, that the involuntariness of his guilty plea resulted from an inadequate explanation of the nature of the crime of conspiracy, and therefore Rule 11 of the Federal Rules of Criminal Procedure was violated. (Defendant's Memorandum of Law, Point I(B)). However, taking into account Friedman's education and intelligence, his counsel's representations and his courtroom conduct, and the fact that the offered acceptance of Friedman's guilty plea followed immediately after that of Gassberg which Friedman had heard, this Court properly found that Friedman understood the nature of the charge.

Key to Friedman's argument is the reliance he places on Irizarry v. United States, 508 F.2d 960 (2d Cir. 1975), which is distinguishable on its facts from the instant case. Essentially, the errors found in the plea proceedings in Irizarry, supra. at 966 were that (1) the full charge was never identified, (2) the nature of the crime of conspiracy was not sufficiently explained, and (3) defendant was not directly asked if he understood the charge and this understanding could not be inferred from the record.

As to the first error, the Court referred to the crime simply as "conspiracy" without identifying the offense the conspiracy intended to commit. Id. at 964. In the instant case, the full charge was set out with precision as follows:

"Q The first count of the indictment basically charges you with conspiracy with your co-defendant and possibly with others to possess with intent to distribute, and/or to distribute, certain schedule 3 narcotic drugs, basically valium and amphetamines."
(Minutes of the Friedman plea proceeding, July 27, 1976, hereinafter "Friedman plea minutes" pp. 3-4).

Gassberg had been given similar explanatory comments shortly before (minutes of Gassberg plea proceeding, July 27, 1976, pp. 3-4) in a plea proceeding which Friedman acknowledged he had heard (Friedman plea minutes at 3).

As noted in Irizarry at 964, the extent of the explanation necessary regarding the nature of the crime varies from case to case. McCarthy v. United States, 394 U.S. 459, 467, n.20 and accompanying text (1969). The complexity of the offense is not the only factor to be considered. Other factors include defendant's age, criminal record, and whether he is represented by counsel. Eagle Thunder v. United States, 477 F.2d 1326, 1328 (8th Cir.), cert. denied, 414 U.S. 873 (1973). Irizarry added as consideration defendant's intelligence, education, and ability to comprehend

what was being said to him, including any language problem which was a possible barrier to defendant's understanding in that case. Irizarry v. United States, supra, at 964, n.3.

Unlike Irizarry, Gilbert Friedman had no language problem, had some college education (see Pre-sentence Report at 6), and was an experienced businessman who started and ran his own businesses. (Friedman's Affidavit to Rule 35 motion, October 26, 1976, at 3). Friedman exhibited his personal attentiveness to, and understanding of, the proceeding and charge by interjecting that no amphetamines were involved, and at the same time explicitly acknowledging that valium was involved. Knowing that Friedman had just heard Gassberg asked if he (Gassberg) understood the charge, (Gassberg plea minutes at 4), this court could well have expected Friedman to ask for clarification of anything he did not understand.

Furthermore, at the commencement of the arraignment in this case, a reading of the indictment was waived, and counsel for defendant volunteered that it had been "explained" to Friedman. (Friedman plea minutes at 2). This Court certainly was entitled to infer from this statement that Friedman had a certain amount of understanding of the charge. This consideration coupled with the above mentioned factors

indicating Friedman's intelligence as well as the court's assessment of his conduct and apparent comprehension at the time of the plea constitutes a satisfactory basis for a determination that Friedman did understand what the crime of conspiracy is. Seiller v. United States, 544 F.2d 554, 563 (2d Cir. 1975). Indeed, Friedman's Memorandum of Law challenges the adequacy of the court's explanation of the charge without contending that Friedman actually did not then comprehend the meaning of "conspiracy". The validity of such a claim by a man of such experience and education would appear dubious. Indeed neither Friedman nor his lawyer has submitted any affidavit swearing that Friedman did not understand the charge. Thus he has shown no actual prejudice. See Kelleher v. Henderson, 531 F.2d 78, 82 (2d Cir. 1976).

The third error in Irizarry was the failure of the court to directly inquire if the defendant understood the charge and the lack of anything in the record from which this understanding could be inferred. By contrast, here the Court did so inquire. His response of correcting the court as to the specific drugs involved before agreeing to the substance of the conspiracy indicates awareness and understanding of what was being said. (Friedman plea minutes at 4).

rs
109

B. There was a factual basis in the record for Friedman's guilty plea

Contrary to Friedman's assertion that this Court failed to ascertain a satisfactory factual basis for the guilty plea, the minutes contain evidence of conduct which constitutes the charged offense. Friedman admitted his knowledge of the existence of the conspiracy and participation in an unlawful act when he stated that amphetamines were not involved in the conspiracy but that he knew valium was. (Friedman plea minutes at 4). He also admitted that he had possession of valium. (Id. at 5). Further, to adopt Friedman's argument would require a more meticulous inquiry into the facts than that required by Irizarry. As recently restated by the Second Circuit:

"the reading of the offenses charged in the indictment, coupled with a defendant's admission that he committed the offenses charged, may provide a sufficient factual basis for a guilty plea where the charge is straightforward and the other elements of the crime are clearly set out." Seiller v. United States, supra. at 565. Irizarry v. United States, supra at 968, n.9.

In the case at bar, the reading of the indictment was waived due to counsel's prior explanation and the Court's statement of the charge was straightforward and accompanied by Friedman's admission. (Friedman plea minutes at 2, 3-4).

- C. The Court's statement as to the limits of the penalty to be imposed was sufficient for Friedman to understand the consequences of his plea

The remainder of Friedman's Rule 11 claim concerns the imposition of a special parole term of three years in addition to his prison term. The alleged errors are that the Court did not explain the unique nature of the mandatory special parole as opposed to ordinary parole and that the amount of mandatory parole was misstated by the Court as two years instead of three years. As a result of these errors, Friedman argues that he did not have a full understanding of the consequences of his plea in violation of Rule 11. The Government contends that these alleged errors do not constitute violations of Rule 11 upon which relief can be granted.

Under Michel v. United States, 507 F.2d 461, 463 (2d Cir. 1974), for compliance with Rule 11 the Second Circuit requires with respect to the special parole term only that the defendant be advised that

it will be imposed and be asked if he understands that fact.
The following colloquy satisfies this requirement:

"Q You know you could go to jail
for five years and pay a \$10,000
fine and two years special parole?
Do you understand that?

A Yes, your Honor."

(Friedman plea minutes at 4.)

Contrary to Friedman's contention, the Court need not define special parole beyond this, once the defendant has acknowledged his understanding, particularly where he is represented by counsel. Indeed, neither defense counsel nor the defendant has submitted any affidavit contending that the defendant did not know what special parole was, or that discussion of special parole would have made any difference to his decision to enter a guilty plea. An evidentiary hearing to ascertain defendant's ignorance of the meaning of the term is not necessary. Id. at 464.

"When a defendant, represented by and in the presence of counsel, states that he does understand the meaning of a consequence of a plea of guilty, we see no need for further inquiry."
Michel v. United States, *supra* at 464.
(See also Poerio v. United States,
405 F. Supp. 1258 (E.D.N.Y. 1975).)

In the instant case, this Court made a general statement as to the requirement that Friedman understand the consequences of his plea and after colloquy as to the waived rights again asked Friedman if he still wished to plead guilty.

"Q You heard me just tell your co-defendant that I could not accept the plea unless I was convinced that it was voluntary that you understood your rights and that you understood the consequences of your plea and, in fact, you were guilty. You heard me explain to him that he would have been entitled to a public trial by a judge, a jury and a jury if he persisted in a not guilty plea. Do you understand that?

A Yes sir.

* * * * *

Q You still wish to plead guilty?

A Yes, your Honor.

(Friedman plea minutes at 3, 5).

Friedman's reliance on United States v. Richardson, 483 F.2d 516 (8th Cir. 1973), is somewhat misplaced in light of two subsequent decisions, Davis v. United States, 417 U.S. 333 (1974) and McRae v. United States, 540 F.2d 943 (8th Cir. 1976). In Davis, the Supreme Court indicated that certain non-constitutional errors are not of the magnitude which warrant such relief as requested here. It relied on its holding in Hill v. United States, 368 U.S. 424, 429 (1962) that

"'Collateral relief is not available when all that is shown is a failure to comply with the formal requirements of a rule of criminal procedure' in the absence of an indication that the defendant was prejudiced by the asserted technical error." Davis v. United States, *supra* at 346.

69

The Eighth Circuit conceded that this decision mandates an alteration of its per se rule in Richardson for withdrawal of guilty pleas for a Rule 11 error with respect to the special parole term. McRae v. United States, supra at 945. The inquiry becomes whether the claimed error was

"'a fundamental defect which inherently results in a complete miscarriage of justice.'" (emphasis added). Davis v. United States, supra at 346, quoting Hill v. United States, supra at 429.

The failure to explain the meaning of the term special parole before accepting a guilty plea under the circumstances at bar does not rise to the level of a fundamental defect as contemplated above. McRae v. United States, supra at 945; Poeri v. United States, supra.

As to the second claimed error, Friedman misstates the penalty for the crime charged. Violations in connection with Schedule III controlled substances carry a maximum prison sentence of five years and/or a maximum fine of \$15,000 and a minimum special parole term of two years for first offenders. 21 U.S.C. § 841(b)(1)(B). Thus, the Court was not in error in stating that a two year special parole term was required.

Friedman may still contend that he was misled as to the consequences of the plea because the court did not make it clear that the two year special parole was a minimum

969 term while the other prison term and fine mentioned were maximums. However, this technical error does not rise to the level of seriousness warranting relief. Recently, courts have wisely and increasingly held that such an error is harmless when the prison sentence imposed on the defendant together with the special parole term do not exceed the maximum sentence specified at arraignment. Bell v. United States, 521 F.2d 713, 714 (4th Cir.), cert. denied, 424 U.S. 918 (1975); Aviles v. United States, 405 F. Supp. 1374 (S.D.N.Y. 1975), aff'd, 538 F.2d 307 (2d Cir.), cert. denied, 425 U.S. 961 (1976); Bachner v. United States, 517 F.2d 589, 597 (7th Cir. 1975). In the instant case, Friedman was made aware of a possible combined seven year penalty, but was given only six years in total.

The doctrine of harmless error was developed to avoid automatic reversals for errors revealed by hypercritical reading of transcripts. Aviles v. United States, supra at 1380. The absence of actual prejudice to the defendant justified the rule, Id. at 1382, and necessarily raises the inquiry of whether defendant would have changed his plea had he known the omitted advice.

"[T]he determination of constitutional voluntariness must be based not only on whether required advice was omitted by a federal district judge, but also on whether it would have made any difference, if given." Kelleher v. Henderson, supra at 82; Aviles v. United States, supra at 1379.

Bachner v. United States, supra at 597, further explains the harmlessness of an error as to special parole:

"the mandatory parole term has no effect on [the] period of incarceration and does not ever become material unless the defendant violates the conditions of his parole. It would be as unrealistic, we think, to assume that he would expect to do so and be influenced by that expectation at the time he is considering whether to plead guilty, as it would be to assume that he would be influenced by other contingencies he is not advised about."

Friedman has submitted no affidavit that he would have changed his plea if the two year special parole had been declared a minimum, nor has he otherwise demonstrated that his reliance on the represented penalty induced his plea of guilty. The same rationale would apply to an objection that the court understated the maximum fine that could be imposed for distribution of Schedule III controlled substances. Friedman has not shown any prejudice resulting from these non-constitutional errors and has failed to establish that his plea was made involuntarily.

In short, Rule 11 was complied with fully.*

* Even had Rule 11 been complied with imperfectly, the guilty plea would not have to be set aside. In Kloner v. United States, 535 F.2d 730, 733 (2d Cir. 1976), the court reiterated the rule that a guilty plea is not invalid simply because the Court did not enumerate one or more of the rights waived by pleading guilty. The inquiry required for compliance with Rule 11, as noted in McCarthy v. United States, supra at 467, n.20, must necessarily vary from case to case. The Court in Kloner therefore, properly evaluated the acceptance of the plea by the "totality of the circumstances." Kloner v. United States, supra at 434.

In contrast, the Second Circuit decided on November 1, 1976 in United States v. Journet, 544 F.2d 633, 634 that "unless the defendant is specifically informed of each and every element enumerated in Rule 11 the plea must be vacated." Given the past practice in this Circuit as represented by Kloner this ruling represents a significant departure and should not be applied to pleas taken prior to November 1, 1976. Most recently, Judge Pierce agreed with this position and held that the Journet decision, being "novel", was not retroactive. United States v. Saft, 76 Cr. 414 (S.D.N.Y. February 17, 1977). (See appendix).

The language of Journet itself is couched in terms of prospective application. Thus, the Court of Appeals stated:

"We now hold that, as a minimum, before accepting a guilty plea each district court judge must personally inform the defendant of each and every right and other matter set out in Rule 11." 544 F.2d at 636. (emphasis added).

Moreover, controlling support for restricting Journet to future application can be found in other decisions on the retroactive application of judicial interpretation of Rule 11's requirements. The Supreme Court in Halliday v. United States, 394 U.S. 831 (1969), which interpreted the 1966 amendment to Rule 11, was to apply only to guilty pleas accepted after the date of the McCarthy decision. Similarly, in Korenfeld v. United States, 451 F.2d 770 (2d Cir. 1971), cert. denied, 406 U.S. 975 (1972), and United States v. Welton, 439 F.2d 824 (2d Cir.), cert. denied, 404 U.S. 859 (1971), the Second Circuit held that its decision in Bye v. United States, 435 F.2d 177 (2d Cir. 1970), which held that a defendant in a narcotics case had to be advised of his

(Footnote continued on next page)

69
II. The Conduct of Friedman's Former Counsel Did Not
Constitute a Mockery of Justice Warranting Relief

Friedman's further claim for relief on the ground that the guilty plea was coerced because of the pressures of the arraignment and alleged ineffective counsel is equally unavailing. The apprehension and tension Friedman felt with respect to the proceeding and the crime committed may have been very real and even motivating factors in his plea but do not affect the validity of the plea. Brady v. United States, 397 U.S. 742, 750 (1970). Friedman does not allege any acts or elements of coercion which demand relief. At the plea proceeding, he explicitly denied that any threats or promises had been made to him to induce his plea. (Friedman plea minutes at 4).

(Footnote continued from previous page)

ineligibility for parole at the taking of a guilty plea, was to be applied only prospectively. The rationale accepted in these decisions is equally applicable with respect to Journet and mandates a holding here that Journet is not retroactive. Accordingly, the principles of Journet are inapplicable to the instant case.

Undoubtedly, Friedman is entitled to effective assistance of counsel. However, the burden of proof to sustain allegations of inadequate counsel rests on defendant, United States ex rel. Marcelin v. Mancusi, 462 F.2d 36, 42 (2d Cir. 1972), cert. denied, 410 U.S. 917 (1973); United States v. Merlino, 391 F. Supp. 533, 535 (E.D. Pa. 1975). Friedman has failed to meet this burden in that the allegations are mere unsupported statements made by his current attorney and the record is lacking an affidavit by Friedman himself as to the type of services the former attorney rendered. Nor has he submitted a personal affidavit waiving his attorney-client privilege and explaining his failure to provide an affidavit from his former attorney. Indeed the accompanying affidavit of Alan Passin, Esq. flatly contradicts counsel for Friedman's hearsay and factually unsupported claims of ineffective assistance of counsel allegations. His failure to submit these documents requires the denial of his motion to withdraw his guilty plea and set aside the judgment of conviction.

The requirement that a petitioner submit an affidavit of his attorney in support of his claims, or submit his own affidavit, attaches when the allegation in his petition charges that he has received inaccurate advice from counsel. Grant v. United States, 451 F.2d 931 (2d Cir. 1971) (Friendly, J.).

Review may not be had on a party's unsupported allegations. Catalano v. United States, 185 F. Supp. 463, 464 (E.D.N.Y. 1959), aff'd, 281 F.2d 184 (2d Cir.), cert. denied, 84 S. Ct. 88, 81 S.C. 910.

The Government respectfully submits that petitioner's motion must be denied unless and until he provides a factually sufficient personal affidavit in support of his claims.

Assuming arguendo, that the allegations were supported, they would not amount to a level of incompetency compelling relief. The standard by which to measure the effectiveness of counsel in the Second Circuit remains that set forth in United States v. Wight, 176 F.2d 376, 379 (2d Cir. 1949), cert. denied, 338 U.S. 950 (1950):

"[T]ime consumed in oral discussion and legal research is not the crucial test of the effectiveness of the assistance of counsel. The proof of the efficiency of such assistance lies in the character of the resultant proceedings, and unless the purported representation by counsel was such as to make the trial a farce and a mockery of justice, mere allegations of incompetency or inefficiency will not ordinarily suffice" United States ex rel. Marcelin v. Mancusi, supra at 42; Wojtowicz v. United States, Dkt. No. 76-2106, slip op. 598 at 1917 (2d Cir. February 22, 1977); United States v. Garguilo, 324 F.2d 794, 795 (2d Cir. 1963).

The burden of proving such inadequacies as make a farce and mockery of justice is clearly a heavy one. Errorless counsel is not required. United States v. Garguilo, supra at 796. Even if another attorney would have resolved the problems differently and Friedman would have profited by sounder advice, the conduct is not such as to shock the court's conscience. Therefore, relief cannot be granted for what amounts to tactical errors or mistakes in strategy as are Friedman's allegation of the absence of motion practice. Id at 797.

Counsel's failure in this case to directly appeal the sentence entered after the guilty plea does not constitute a ground for relief.

"No lawyer is under obligation to appeal a judgment if in his professional opinion no error has been committed by the trial court and no appeal properly lies. Indeed his obligation is the other way." Lewis v. United States, 294 F.2d 209, 211, 111 U.S. App. D.C. 113 (D.C. Cir.), cert. denied, 368 U.S. 949 (1961).

Friedman has not established that the decision not to appeal was made on a basis other than a realistic assessment of the merits of the case and likelihood of a successful appeal. Nor has Friedman indicated what order or action it was from which an appeal should have been taken.*

* Since government counsel had not consented to preserving any pre-guilty plea issues for appeal, no such issues were appealable. Nor is government counsel aware of the existence of any such issues.

It is unrealistic to suppose that an educated man who has borne an emotional burden as substantial as Friedman claims he has with respect to this case would be unconscious of his right to appeal or would not be compelled to inquire as to the possibility if he had the interest to pursue an appeal. In fact, it is likely that Friedman's immense consternation at his sentence developed not within 10 days of his own sentence -- but about a month later when his co-defendant was put on probation. Shortly thereafter Friedman, by a new attorney, filed a Rule 35 motion.

Friedman claims finally that his counsel did not have adequate knowledge of the facts of the crime and failed to investigate. However, the entire Government file was made available to counsel prior to the time Friedman pleaded guilty. Defense counsel then, was at least equally informed as Government counsel, and it is likely that he advised his client in light of the weight of the evidence. An evaluation of the ineffectiveness of counsel usually begins by examining the strength of the prosecution's case. United States ex rel Marcelin v. Mancusi, supra at 43.

One court has suggested that even where the lack of effective counsel has been proved sufficiently to invalidate a guilty plea, "the subsequent conviction is [still] valid if there is clear proof that no prejudice resulted." Sims v. United States, 272 F. Supp. 577, 598 (D. Md. 1966),

aff'd, 382 F.2d 294 (4th Cir. 1967), cert. denied, 390 U.S. 961 (1968). Even if defendant Friedman's proofs of counsel's inadequacies are accepted, relief should not be granted if Friedman did not rely on any of these defects in representation in deciding to plead guilty. Id.

III. The court had adequate and accurate pre-sentence information with which to sentence petitioner

Friedman contends that this Court relied upon an inaccurate pre-sentence report. However, the pre-sentence report presented both the Government's and Friedman's versions of the circumstances surrounding the criminal activity to which petitioner pleaded guilty as well as statements made by a number of persons who knew him. With the whole report, in addition to the statements made by Friedman and his counsel at the sentencing, the Court had sufficiently adequate and accurate pre-sentence information to sentence Friedman.

The mere presence in a pre-sentence report of alleged inaccuracies against Friedman does not necessarily entitle him to relief from the sentence imposed. United States v. Needles, 472 F.2d 652, 659 (2d Cir. 1973), see also Putt v. United States, 363 F.2d 369 (5th Cir. 1966). In United States v. Needles, supra, the defendant alleged he was improperly sentenced as a "gun dealer" upon the pre-sentence report which alleged in detail his gun dealing activity but which offered no evidence whatever to support the charge. Conceding that "material false assumptions as to any facts relevant to

sentencing, renders the entire sentencing procedure invalid as a violation of due process," citing United States v. Malcolm, 422 F.2d 809, 816 (2d Cir. 1970), the Court did not deem it necessary to hold an evidentiary hearing "each time the defendant asserts the falsity of some statement in his pre-sentence report." United States v. Needles, supra at 657.

The Court went on:

"Perhaps in a case where defendant denied everything and there was a chance that an entire incident had been manufactured or that serious charges in the pre-sentence report on which the judge sought to rely were completely false, we would require further corroboration of the report even though the sentencing judge thought it unnecessary. But this is not such a case . . . (W)here . . . most of the agents' key assertions were corroborated by defendant's admissions, undisputed facts or real evidence - the court did all that was required. Cf. Williams v. Oklahoma, 358 U.S. 576, 584, 79 S.Ct. 421, 3 L.Ed.2d 516 (1959). The judge gave defendant a chance in open court to present his side of the story. Compare with United States v. Malcolm, supra. Having afforded defendant this opportunity, the judge did not have to believe him." United States v. Needles, supra at 658 (emphasis added, footnote omitted).*

* In United States v. Malcolm, supra, no such opportunity was given the defendant. In that case, the sentencing judge expressly refused to hear any mitigating circumstances from either defense or the prosecution and it was "the combination of procedural irregularities, confusion, misunderstanding and misinformation in the sentencing process" that required resentencing in that case. Id. p. 819. In addition, the court stated that the confusion about the defendant's past criminal record relied on by the court, standing alone, could be more a matter of semantics than of substance.

In this case the portion of the pre-sentencing report reciting the "Government's Version" revealed information from Government files that an informant had advised Government agents that Friedman and co-conspirator Gassberg were wholesale distributors of drugs, that Friedman was responsible for distributing approximately 10,000 to 20,000 various barbituates on a weekly basis and that the drugs so distributed were pharmaceutically manufactured. Pre-Sentence Report at 2 (Sept. 8, 1976) (hereinafter "Government's Version"). Evidence admitted by Friedman partly corroborated those statements. Friedman admits that in October of 1975 he purchased 20,000 pills, that he did meet Alan Gassberg who reportedly had large customers for these drugs, and that he did sell approximately 2,300 pills to various friends. Pre-Sentence Report 2, 12 (Sept. 14 1976) (hereinafter Report). Furthermore, at the time the two defendants were arrested, the DEA purchased 1,000 pills from Gassberg. Five thousand one hundred two tablets were in his possession at the time he was arrested and 10,880 pills were found in Friedman's apartment following his arrest, a number of which were pharmaceutically manufactured. Government's Version 2, 3. Thus, most of the informant's assertions were corroborated by Friedman's admissions and real evidence in the report itself. In addition, there is evidence from Thomas Wong, a pharmacist, that Friedman on occasion asked him for controlled

drugs and, at one time, offered to sell a controlled substance to Wong, although Friedman denied this statement.

Nor can Friedman contend that he was unaware of the informant's version. Probation Officer Mendel recalls discussing the informant's version while preparing the pre-sentence report.

Nor was the pre-sentence report limited to the government's version. The "Defendant's Version" portion contained Friedman's contention that this had been a "one shot" deal. Moreover, at the sentencing Judge Duffy afforded Friedman the opportunity to exercise his right of allocution during the course of which he expressly denied having ever purchased pills prior to or since this "one shot situation." Transcript 5. Having afforded Friedman this opportunity, the Judge was not bound to believe him. United States v. Needles, supra at 658.

It is also clear from the record that Friedman's attorney reviewed the pre-sentence report and had an opportunity to rebut any inaccuracies contained therein.* Sentencing

* Defendant's counsel clarified the reference to an outstanding debt owed to the Federal Government and emphasized that "any involvement that Mr. Friedman had in relation to monies was all involved in his business" (Transcript 2), and that he did not sell pills for personal gain, but to salvage his business (Transcript 3), thereby rebutting any inaccuracies in the statement that Friedman impressed the probation officer as a financial manipulator.

Transcript 2-4 (Sept. 17, 1976) (hereinafter Transcript).

It was also clear from the pre-sentence report and the record that Friedman was going through a period of financial and marital difficulties, Report, 3, 4, 5, 6, 9, and Transcript 5, and that he was under the care of a psychiatrist, Dr. Alger, who confirmed these difficulties. Report 7. Friedman is not presenting any facts in this regard which were not before the court at the time sentence was passed. United States v. Stromberg, 179 F. Supp. 278 at 280 (S.D.N.Y. 1968). With this information before the court, it is not significant that his ex-wife referred to him as a pathological liar where other evidence described Friedman as a "hard conscientious worker for most of his employment with Callahan" who "was liked by all the people that worked for him . . ." Report 8.

Thus, taking the entire sentencing procedure as a whole, one cannot say that it is invalid as a violation of due process.

CONCLUSION

For the foregoing reasons, the Government respectfully requests that the prayed for relief be denied in all respects.

Respectfully submitted,

ROBERT B. FISKE, JR.
United States Attorney for the
Southern District of New York
Attorney for the United States
of America

RHEA KEMBLE NEUGARTEN
HARRY C. BATCHELDER, JR.
Assistant United States Attorneys
Of Counsel

76 Cr. 414, UNITED STATES OF AMERICA v. HOWARD E. SAFT

ENDORSEMENT ORDER

Defendant Howard Saft moves, pursuant to Rule 32(d) Fed.R.Cr.P., to withdraw his plea of guilty entered on September 28, 1976. Upon due deliberation, the Court concludes that the motion should be denied.

The attached motion was filed November 24, 1976. In his papers, defendant Saft asserted his innocence and alleged that his plea of guilty was involuntary. There was at the outset no claim that the Court had failed to comply with the requirements of new Rule 11 Fed.R.Cr.P. Rather, defendant argued that he was pressured into pleading guilty by the actions of his former counsel. On January 28, 1977, while the motion was under advisement, defendant filed a supplemental memorandum urging that his motion should be granted in light of United States v. Journet, 544 F.2d 633 (2d Cir. 1976). In opposition, the government argues that Journet is not retroactive and that the plea was voluntary.

This Court presided over the taking of Saft's plea of guilty. The transcript of that proceeding demonstrates that Saft's plea was, in the traditional sense of the word, voluntary when made. This Court, upon listening carefully to the defendant's answers during the allocution and observing his demeanor, was fully satisfied that the plea of guilty was a knowing and voluntary decision, made following consultation with counsel. Defendant Saft clearly is a well-educated and sophisticated man; he holds a degree in business administration from Columbia University School of Business; he was a member of the New York Jewelry Board of Trade; he formed his own business, Adlay Jewelry, in 1958, and saw that business grow to the point where he had many retail outlets throughout the United States. The Court has no doubt that Saft's decision to plead guilty was a difficult one; however, that does not mean that it was involuntary. This Court does not believe that a plea is rendered involuntary simply because a defendant, following a plea, changes his mind and decides that he might be better off proceeding to trial or retaining different counsel.

Although Saft now asserts that he is innocent of the charges, those allegations are in the main conclusory, particularly with respect to Count 22. He claims that his attorney pressured him into a plea; however, upon a review

of Saft's own affidavit and the affidavit of his former attorney, it is clear that contrary to his allegations, Saft did admit guilt to his former attorney in the course of their preparation for the plea allocution. The Court concludes that Saft's former counsel did not "importune" the defendant.

Saft claims that his former counsel strenuously advised him that he should take a plea to three counts instead of going to trial on twenty-two counts; that Saft might receive a longer sentence if he went to trial and was convicted on multiple counts; that it would be difficult to empanel an impartial jury; that the trial would be long, arduous and highly publicized; that the government had the testimony of at least one of his co-defendants; that the government had evidence that Saft had destroyed documents as well as evidence that demonstrated Saft's prior knowledge of the crimes involved. Finally, Saft alleges that his attorney had to rehearse him over and over again to prepare him for the plea allocution..

The Court does not find that these statements, assuming arguendo they were made, constitute misconduct or undue pressuring on the part of the former attorney. Actually, Saft seeks to discredit only two of the alleged statements--to the effect that the government had certain evidence--by reporting that his newly-retained counsel has found no such incriminating documents in the litigation file. Yet such an observation does not preclude the defendant's former lawyer from having seen the documents referred to; the inference Saft wishes the Court to draw is far too tenuous.

Indeed, even taking all the factual allegations of defendant's moving papers at face value, the Court does not conclude thereby that the plea was involuntary. The Court does not find itself persuaded that the circumstances eliminated Saft's free will or that he was unduly pressured by his attorney. Rather, Saft's own affidavit reveals that he decided to plead guilty several days before the pleading and that his attorney informed him that, in the final analysis, the decision to plead guilty was Saft's alone. Having found that Saft admitted guilt to his counsel, having taken the plea and observed the demeanor of the defendant, and having determined at that time that the plea was voluntary, the Court has read nothing in the submissions that leads it to conclude otherwise now.

76 Cr. 414 (cont.),

Defendant makes no request for a hearing prior to decision on his motion; the government has made such a request only in the event the Court does not conclude that the papers are insufficient on their face. Since the material facts are not in dispute, and since it is clear that the motion is insufficient on its face, no hearing is necessary.

A motion to vacate a plea prior to sentence is addressed to the sound discretion of the district judge. See United States v. Lombardozzi, 436 F.2d 878, 881 (2d Cir.), cert. denied, 402 U.S. 908 (1971). After a repeated and careful review of the affidavits and the arguments of counsel, and not even considering the affidavit of the prosecutor, but basing the decision primarily on the transcript of the plea proceeding, this Court concludes that Saft's plea of guilty to the three counts in question was knowing and voluntary, and that there was a factual basis for the plea.

Finally, in his supplemental papers recently received, Saft argues that his motion should be granted in light of United States v. Journet, 544 F.2d 633 (2d Cir. 1976). The plea herein was taken on September 28, 1976, and Journet was decided on November 1, 1976; thus the Court must consider whether Journet should be given retroactive effect.

In Kloner v. United States, 535 F.2d 730 (2d Cir. 1976), the Court of Appeals repeated the oft-cited rule that a guilty plea will not be invalidated simply because the district court failed to enumerate one or more of the rights waived by the defendant in pleading guilty. See 535 F.2d at 733. Rather, Kloner ruled that in the Rule 11 inquiry, the court must look to the "totality of the circumstances". 535 F.2d at 734. That is what the Court has done herein.

Accordingly, it is apparent that the "each and every" holding of Journet constitutes a significant departure from past practice and precedent in this District and Circuit. This Court believes that the Journet decision is indeed "novel" and thus is not retroactive pursuant to the analysis set forth in Ferguson v. United States, 513 F.2d 1011 (2d Cir. 1975). Nor is Journet retroactive under the traditional tripartite test of Halliday v. United States, 394 U.S. 831, 832 (1969). The purpose and effect of Journet has been to mandate a specific procedure for the taking of guilty pleas in the future; reliance on the "totality of the circumstances" approach was widespread, and it is abundantly clear that a retroactive application of Journet's "each and every" standard would mandate the vacating of scores of guilty pleas

76 Cr. 414 (cont.)

entered in this court, many of which have been followed by the imposition of a prison sentence, and thus would have a substantial impact upon the administration of justice. Accordingly, under the precedent of decisions considering the retroactive application of judicial interpretation of Rule 11's requirements, the Court concludes that Journet is not retroactive to this case. Viewed in the totality of the surrounding circumstances as recited above, the Court concludes that the claimed technical deficiencies in the Rule 11 allocution did not operate to create any cognizable defects in the taking of Saft's plea. Under Kloner v. United States, the allocution was sufficient.

Accordingly, the motion to vacate the plea of guilty previously entered is hereby denied. This matter is set down for sentence on March 3, 1977 at 4:00 p.m.

SO ORDERED.

Dated: New York, New York
February 17, 1977

LAWRENCE W. PIERCE
U. S. D. J.

JUDGE DUFFY

HCBjr:gdd
3-2045

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-v-

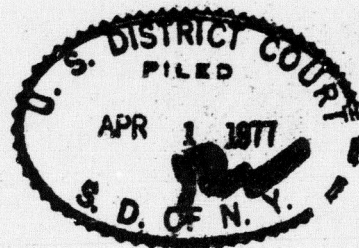
GILBERT FRIEDMAN,

Defendant.

AFFIDAVIT

76 Cr. 441 (KTD)

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:
SOUTHERN DISTRICT OF NEW YORK)



HARRY C. BATCHELDER, JR., being duly sworn, deposes
and says:

1. I am an assistant in the office of Robert B. Fiska, Jr., United States Attorney for the Southern District of New York and was the assistant in charge of the case at bar.
2. On or before July 27, 1976, I permitted defendant's counsel, Allan Passin, to review the Government's complete investigation file in his client's case prior to Friedman's entering a plea of guilty to Count 1 of the indictment.
3. Included in the file was a statement that government agents were advised by a confidential informant that Friedman and Gassberg were involved in the wholesale distribution of large quantities of dangerous drugs in the area of east side Manhattan, that defendant Friedman was responsible for distributing approximately 10,000 to 20,000 various barbiturates on a weekly basis, and that the drugs distributed by Friedman and Gassberg are pharmaceutically

4. At no time before the guilty plea was A-131 entered did the government consent to dependant preserving any pre-plea issues for an appeal.

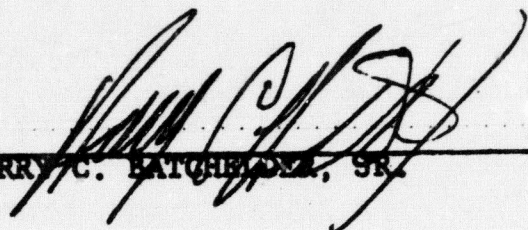
HCB, Jr: sr
3-2045

5. Friedman now attempts, without any accompanying Affidavit, to claim that his counsel was ineffective in not engaging in senseless appellate practice. These hearsay allegations do not require a hearing and are refuted by the accompanying Affidavit of Alan Passin, Esq. The absence of a sworn statement by Friedman is not inconspicuous by its absence.

6. As further evidence of the shotgun approach by defense counsel Friedman also has submitted no Affidavit that he would have changed his plea if the two year special parole had been described as a minimum. Indeed, Friedman received far shorter incarceration than could have been imposed.

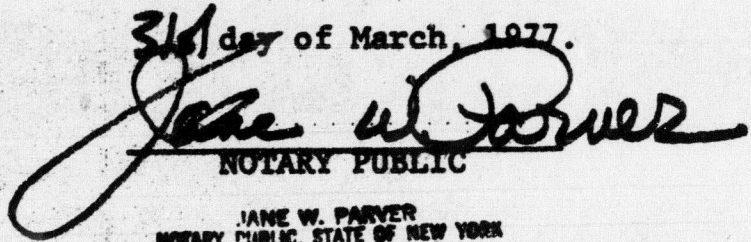
7. I have been informed that in the course of the pre-sentence investigation by Probation Officer Mendel, he had occasion to interview the petitioner Gilbert Friedman several times. At one such interview he advised the petitioner that an informant alleged that he (Friedman) was responsible for distributing approximately 10,000 to 20,000 various barbiturates on a weekly basis. Friedman denied these allegations, maintaining that his arrest marked essentially the first time he became involved in this activity. Presentence Report 2, 12 (Sept. 14, 1976).

8. Friedmans afterthought, inaccurate and unsupported allegations require no hearing and his motion should be denied in all respects.


HARRY C. HATCHEMILLER, SR.

Sworn to before me this

31st day of March, 1977.


NOTARY PUBLIC

JANE W. PARVER
NOTARY PUBLIC, STATE OF NEW YORK
No. 31-4528338
Qualified in New York County
Commission Expires March 30, 1978

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

UNITED STATES OF AMERICA,

Plaintiff,

- against -

GILBERT ANDREW FRIEDMAN, a/k/a "CHRIS",

Defendant.

AFFIRMATION IN
OPPOSITION

No. 76 Cr. 441 K.T.D.

-----X

STATE OF NEW YORK)
 : SS:
COUNTY OF NEW YORK)

ALLAN PASSIN, hereby affirms the following, under
the penalty of perjury:

That I am an attorney at law duly admitted to practice
law in the State of New York, and associated with PASSIN &
WILLIAMS, P.C.

That I was the attorney of record for GILBERT FRIEDMAN
the petitioner herein.

That I have read the affirmation of WILLIAM L.
FINGER, ESQ. and offer this affirmation to refute the allegations
made at this time by this petitioner that he did not knowingly
and intentionally offer the plea of guilty.

There is no question of the fact, in my mind, that
GILBERT FRIEDMAN knowingly and willingly offered the plea of
guilty after consultation with me, as his attorney and friend.
He completely understood the nature of the proceedings and under-
stood the consequences of his plea, as can be seen by his sub-
sequent affidavit requesting a suspended sentence which was
submitted to this court in October 1976.

Furthermore, as to whether or not petitioner's Constitutional rights were violated and whether or not my representation of the petitioner was effective, the minimal motion practice which the petitioner is attempting now to use as a basis to prove a violation of his Constitutional rights, had been discussed with the client at the time that I was retained. At that time, GILBERT FRIEDMAN, stated that he invited the officers in and allowed them to search his premises. Whereupon, they located the vast portion of the pills which he had been selling, some of which he had just sold to his co-defendant.

It was then decided to plead to one of the counts, or, if possible, a lesser charge, to avoid a trial and to further avoid the government going into how the 50,000 pills were obtained by Mr. Friedman.

Mr. Friedman informed me at that time that he was guilty and was willing to change his plea, if he could reasonably be assured of a lenient sentence. He was told that no assurance could be made. However, if his pre-sentence report was satisfactory, and being a First Offender, in all probability, the sentence would be lenient.

That I received the government's complete file prior to having Mr. Friedman plead guilty and same was discussed with Mr. Friedman at the time.

As to why no Notice of Appeal was filed by your affirmant, Mr. Friedman informed me that I no longer represented him and that he was obtaining the services of another attorney

to file an application for a reduction of sentence and a request for probation, which I understand, at some point had been done by another attorney.

It is my opinion, that based upon all the facts and circumstances, Mr. Friedman was more than adequately represented and knew the full extent and consequences of his plea of guilty.

Dated: New York, New York
March 25th, 1977



Allan Passin

1 1235

1

2 UNITED STATES DISTRICT COURT

3 SOUTHERN DISTRICT OF NEW YORK

4 -----X

5 UNITED STATES OF AMERICA :

6 vs. : 76 Cr. 441

7 GILBERT FRIEDMAN, :

8 Defendant. :

9 -----X

10 New York, New York

11 April 19, 1977 - 2:00 p.m.

12 B e f o r e :

13 HON. KEVIN THOMAS DUFFY,

14 District Judge

15 Appearances:

16 ROBERT B. FISKE, JR., Esq.

17 United States Attorney for the
Southern District of New York

18 BY: RHEA NEUGARTEN, Esq.

HARRY C. BATCHELDER, Jr., Esq.

Assistant United States Attorneys

19 WILLIAM L. FINGER, Esq.

Attorney for the Defendant

20 BY: STEPHEN FINK, Esq., of Counsel

1 1255

2

2 (Case called.)

3 THE COURT: It is your motion, counsel.

4 MR. FINK: First of all, your Honor, let me thank
5 you for understanding the problem that we had had this
6 morning in Supreme Court in New York County.

7 THE COURT: I used to be in private practice and
8 got hurt too by those problems.

9 MR. FINK: Furthermore I would like to point out
10 to your Honor that the petitioner's parents are in the
11 courtroom today.

12 I think that our memorandum of law does adequately
13 set forth most of what we are claiming in this matter. We
14 rely on various Supreme Court and Second Circuit cases
15 to make our three basic points.

16 Our first contention is basically that the plea
17 itself was not voluntary. We rely on the McCarthy case,
18 the Supreme Court case that sets a rather strict standard
19 for the trial courts in determining whether the plea
20 accepted by the petitioner in this case was voluntary in
21 nature and there is a major case in this Second Circuit,
22 the Irizarry case, which notes the type of complete inquiry
23 that must be pursued by the Court in determining whether or
24 not the defendant in the case has indeed understood the
25 nature of the charge. The problem in Irizarry, which was

1 1233 3

2 a conspiracy matter again, was that there was not adequate
3 inquiry by the trial court into determining whether the defen-
4 ant in that case did adequately understand exactly what a
5 conspiracy was. A study of the case shows as to the tran-
6 script of the plea itself that the matter became sidetracked.
7 The Judge in the case sought to determine whether Irizarry
8 truly understood what he was pleading to. The government
9 notes a more recent case, Seiller, in this Second Circuit
10 in claiming that the instant matter is closer to that case.
11 However, if your Honor has had opportunity to look at the
12 Seiller case itself, the explanation of the Court before
13 taking the plea of the defendant in that case is quite
14 complete. There is a complete reading of the indictment in
15 that case. Each point of the indictment is completely
16 explained to the defendant and he is asked at least three
17 times whether he understands what he is indeed pleading to.

18 We would claim that the instant case is closer,
19 in fact falls within the scope of Irizarry in that Mr.
20 Friedman never truly understood the nature of the conspirac
21 that he was pleading to. Somewhere along the line in the
22 trial transcript there seems to have been an attempt
23 by your Honor to determine whether he did indeed conspire
24 with Mr. Gassberg to commit this crime. However it's
25 just a brief reading of the charge that he is pleading guilty

1 lzss

4

2 to. It does not go into the specification of the exact
3 charge itself in contrast to Seiller and we would point out
4 therefore that Mr. Friedman did not truly understand the
5 nature of the conspiracy charged. It is irrelevant that he
6 is a man of education, which he is, because that does not
7 mean he is experienced in these kinds of matters. Considering
8 the fact that this was indeed his first offense, he simply
9 did not understand exactly what was going on in the court-
10 room that day and as we will indicate a little bit further
11 counsel, his counsel Mr. Passin, did not adequately explain
12 all the intricacies of the court proceeding.

13 Again in contrast to Seiller. In Seiller the
14 defendant had rather a long criminal record and had taken
15 several pleas to felonies before. Once again I would
16 remind your Honor that this was Mr. Friedman's first offense.

17 We have also indicated some other defects. The
18 explanation that he faced a maximum of five years incarceration
19 and two years special parole in and of itself is not
20 enough to overturn the plea itself, to vacate the plea.
21 However we do feel that combined with some of the other
22 points that I have indicated today and that are explained
23 in great detail in my memorandum of law, combined with
24 those matters, they do show sufficient reason to vacate the
25 sentence or at least to set up an evidentiary hearing.

1 1233

5

2 We would also indicate, of course, the matter
3 of pressure on the defendant. Obviously a defendant standing
4 before a Court feels a great deal of trepidation at the
5 prospect of possible incarceration or even to be put on
6 probation. However, I feel your petitioner does feel,
7 combined with these other elements that we have gone into,
8 this adds to the necessity of vacating the plea since the
9 plea itself was not voluntary in that it was not a knowing
10 waiver of his constitutional rights as McCarthy requires
11 of Rule 11 pleas.

12 Our second point was inadequate counsel. We are
13 aware of the fact that the Second Circuit follows the Wright
14 test, a 1949 test. However, we would claim that it is time
15 that this Court recognized some change that has developed
16 in this area. We suggest that District of Columbia Circuit's
17 test as shown in Scott vs. United States, which asks us
18 was a substantial defense blotted out. That is a test,
19 it is not as difficult a test to comply with for petitioners
20 as Mr. Friedman. In our brief we did point out to your
21 Honor the problems that have been noted in lawyers practicing
22 before the Federal Courts. In fact we had noted a recent
23 case, it was a civil case but we had noted this recent case,
24 either it was in the Southern District, if I recall, or the
25 Eastern District, in which the incompetency of the lawyers

1 lzss

6

2 practicing in that case was shown by that lawyer's reliance
3 on a State of New York statute to determine some issue that
4 was facing the Court at that time. In other words, what
5 we are saying was that Mr. Passin himself was not adequately
6 prepared to represent Mr. Friedman before this Court
7 because he did not have a professional background in criminal
8 law and I did note that there is an affidavit filed by Mr.
9 Passin, but I would be quite surprised if he had agreed
10 with us that his representation of Mr. Friedland was inadequate.
11 It would not seem something that a lawyer would usually do.

12 We do note also that an appeal was never filed
13 in this case. We would point the Court to the District
14 Judge Platt's rather lengthy decision in I believe it is
15 Collins, the name of the case, that he discussed this matter
16 of appeal, whether or not there has to be a viable issue
17 to appeal or not presented before the Court. What Judge
18 Platt indicates is that the question is basically whether
19 or not the right of appeal has been frustrated and that is
20 all that has to be shown. In Mr. Friedman's case that is
21 exactly what we have shown. Mr. Passin presents some
22 indication that he didn't file the appeal because Mr. Friedman
23 fired him and never paid his fee. We would contend that
24 once again, an evidentiary hearing at the very least is
25 needed to determine exactly Mr. Passin's reasons for not

1 lzss

7

2 doing a rather simple matter, which is just to file a
3 notice of appeal for Mr. Friedman.

4 Again in our brief we have indicated matters con-
5 cerning the lack of motion practice. Mr. Friedman has
6 informed me furthermore that there has been no investigation,
7 he was never told of any investigation proceeding into the
8 incidents themselves. The record just does not show -- the
9 record does not show any indication that Mr. Passin sought
10 to determine whether or not there were any defenses
11 available to Mr. Friedman and I think that the reason for
12 that, quite simply is that he just didn't know what to do.

13 Finally, the third point that we make is the
14 pre-sentence report as being inadequate. I realize that there
15 had been some motions sent to your Honor by Mr. Friedman's
16 second attorney seeking to reduce the sentence. We make
17 that point, the points made in those motions we would
18 reiterate at this time. We do feel that before your Honor
19 there was improper information that the probation officer,
20 Mr. Mendel, had acquired or misinterpreted. Again at the
21 very least an evidentiary hearing is required to determine
22 as to the truth of some of these statements which Mr.
23 Friedman and Mr. Friedman's last attorney and several other
24 people, including Mr. Friedman's wife, have told me concerning
25 the facts presented to your Honor as being improper or

1 1255

2 incorrect. For that reason we would ask, again, that the
3 sentence be vacated or, in the alternative, that a hearing
4 be set down to determine the facts in this matter to decide
5 if the sentence should be vacated.

6 THE COURT: Okay. Miss Neugarten.

7 MS. NEUGARTEN: Yes. The government has filed, as
8 you know, lengthy papers in response to the motion and rather
9 than rehash those lengthy papers here I just want to highlight
10 three points.

11 On Irizarry, I think a reading of the case makes it
12 clear that one problem that the Court of Appeals had was the
13 feeling that the trial court--rather the trial court had
14 not even asked the defendant or made clear what the conspiracy
15 was about. Here, your Honor, of course, directly told the
16 defendant that he had been charged with conspiracy to do
17 certain things and he interjected of his own accord that
18 although the conspiracy did concern valium, that it did not
19 concern amphetamines and that showed beyond a shadow of
20 a doubt that he knew what your Honor was talking about and
21 what the indictment charged him with.

22 On the matter of the special parole, the Aviles
23 case makes it clear that it is at the very worse harmless
24 error in that the defendant was appraised of the fact that
25 he had outside exposure of seven years penalty, five years

1 1235

2 jail time and two years special parole, even without being
3 told that the two year is a minimum rather than a maximum
4 and the sentence that he received was within that seven
5 year period. It was in fact a period of six years penalty.

6 On the question of ineffective assistance of
7 counsel --

8 THE COURT: Isn't it true on Schedule III drugs
9 the minimum is two years?

10 MS. NEUGARTIN: Yes. I believe the defendant's
11 contention is that your Honor did not expressly state that
12 it was a minimum, but whether or not you did, you did tell
13 him there was at least seven years penalty he was facing,
14 five years jail time plus two years special parole and your
15 Honor sentenced him within that period to six years in total.

16 On the ineffective assistance of counsel, although
17 after a trial it is perhaps routine for defense counsel to
18 file a notice of appeal it is anything but routine for a
19 notice of appeal to be filed after a guilty plea and indeed
20 it is only in an extraordinary situation where that is
21 done. Here the record makes it seem as though it was not
22 immediately after his own sentence that the defendant
23 decided he wished to appeal the sentence, if indeed that
24 was the remedy he sought, but rather after he saw what his
25 codefendant, Mr. Cassberg, had received and at that point

1 1255

10

2 rather than taking an appeal he took what the government
3 would suggest was the more appropriate procedural remedy
4 anyhow. He filed a Rule 35 motion and that was a wholly
5 professional and appropriate thing for his then counsel to
6 do.

7 Finally, on the question of ineffective assistance
8 of counsel, the counsel performed an investigation which
9 consisted of reviewing the government's entire file and
10 presumably discussing that file with the defendant. The
11 defendant is an educated man and was in a position to direct
12 his attorney's efforts and to discuss the matters with
13 him and rather than rehash any further arguments, the
14 government has nothing further.

15 THE COURT: What do you think about the case of
16 United States against Michaelson? Do you think that has
17 anything to do with this?

18 MS. NEUGARTEN: Michaelson?

19 THE COURT: Michaelson.

20 MS. NEUGARTEN: If your Honor would refresh my
21 recollection.

22 THE COURT: March 31st.

23 MS. NEUGARTEN: The Journet case. It is not
24 really a Journet point in that this is not a question of
25 whether Rule 11 was complied with in that the Trizarry

1 1255

11

2 claim does not go to the procedural matters of Rule 11 and
3 I think that Michaelson goes to the procedural questions
4 under Rule 11 and there is no contention here that your
5 Honor did not fully allocute the defendant as to his
6 procedural rights.

7 THE COURT: Isn't it interesting I did exactly
8 the same thing that has been done for years in this district,
9 not only in this district, nationwide, to the point where it
10 has been reduced to writing and handed to new judges when
11 they go on the bench. That is done by the Federal Judicial
12 Center in connection with their continuing education program.
13 I don't know if you knew that.

14 MS. NEUGARTEN: No, I did not.

15 THE COURT: It happens to be a book right here
16 called The Bench Book for United States District Court
17 Judges. It is prepared and put out, prepared under the
18 auspices of the Federal Judicial Center by the staff of the
19 Institute of Judicial Administration under the supervision
20 of the Committee of United States District Judges. Every
21 Judge has one, including the author of both Journet and
22 the others.

23 Okay, I think I got your point.

24 Mr. Batcher, this is going to be the first
25 time in your career that you came into court and had nothing

1 less

12

2 to say.

3 MR. BATCHELDER: No, sir. That is not true.

4 THE COURT: It happened once before?

5 MR. BATCHELDER: I know when I am better represented

6 THE COURT: Thank you. I will reserve decision.

7 - - -
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

ORDER AND OPINION OF JUDGE DUFFY
DENYING DEFENDANT'S MOTION

A-148

d3

C² ref

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
:
UNITED STATES OF AMERICA
:
-against-
:
GILBERT ANDREW FRIEDMAN, a/k/a
"Chris",
:
Defendant.
:
-----x

OPINION AND ORDER

76 Cr. 441

#45930

APPEARANCES:

HONORABLE ROBERT B. FISKE, JR.
United States Attorney, S.D.N.Y.
Attorney for the Government
By: Rhea Neugarten, Esq.
Harry C. Batchelder, Jr., Esq.
Asst. United States Attorneys
Of Counsel

FINGER, GOLDBERG, ZINNER & FINGER, ESQS.
Attorneys for Defendant
By: William L. Finger, Esq.
Stephen David Fink, Esq.
Of Counsel

KEVIN THOMAS DUFFY, D.J.

On July 27, 1976, Gilbert Andrew Friedman withdrew his plea of not guilty and entered a plea of guilty to one count of conspiracy to possess with intent to distribute certain schedule 3 narcotic substances. The defendant was represented by private counsel. On

MICROFILM

WAT - 5 1511

25 15 77

2.

September 17, 1976, after exercising his right of allocution, he was remanded by this Court to the custody of the Attorney General for a period not to exceed three years to be followed by a special parole term of three years. Thereafter his original counsel was discharged and new counsel was retained. On October 29, 1976, the new counsel moved under Rule 35, Fed.R.Crim.P., to reduce the sentences. Accompanying the motion were letters of support from friends and associates of Mr. Friedman. I denied the motion on December 16, 1976.

Following the denial, second counsel was discharged and third counsel was retained. A motion has now been made to permit the withdrawal of the plea of guilty pursuant to Rule 32(d) of the Fed.R.Crim.P. on the grounds that the plea was constitutionally defective, defendant was ineffectively assisted by counsel, and errors were present in the presentence report.

I.

It seems a futile exercise to quote from the plea minutes at length. They speak for themselves. I note that Friedman through his attorney waived a reading of the indictment, and that Friedman was informed that he had a right to a public trial before a judge or judge and jury; that at

3.

such a trial he had the right to confront witnesses and cross-examine them; that he would be presumed innocent until proven guilty; and that he would be entitled to call his own witnesses and, if necessary, the Court would issue orders to have such witnesses produced. At four separate junctures, Friedman expressly acknowledged that he understood these rights.

I then asked the defendant if he understood that the indictment charged him with distributing or possession with intent to distribute valium and amphetamines. Friedman expressed his awareness of the charge by stating that as far as he knew, only valium was involved in the conspiracy. When asked whether he did in fact possess the valium, he answered in the affirmative.

Friedman further indicated that no threats or promises had been made to induce him to plead guilty and that no one made any predictions as to the sentence that might be imposed. He indicated that he was not under the present influence of any narcotic drug or alcohol and that he was not then under the present care of a psychiatrist or physician.

Defendant's initial argument is that he did not "understand the essential elements of the crime charged." McCarthy v. United States, 394 U.S. 459, 471 (1969). However,

4.

when I asked Friedman whether he wished the first count read to him, his private counsel responded, "Your Honor, we waive the reading. It has been explained to him." The record also indicates that Friedman heard the plea allocution of his co-defendant, Alan Gassberg.

I explained to Friedman the count to which he was pleading in the following manner:

"Q. The first count of this indictment basically charges you with conspiring with your co-defendant and possibly with others to possess with intent to distribute, and/or to distribute, certain schedule 3 narcotic drugs basically valium and amphetamines.

Do you understand that, sir?

"A. Excuse me, your Honor?

MR. PASSIN: Your Honor, my client explains to me there were no amphetamines at all.

THE COURT: As far as he was concerned, but as part of the conspiracy.

"Q. Do you agree it was part of the conspiracy?

"A. There was no amphetamines, your Honor, not to my knowledge.

"Q. But did you know about the valium?

"A. Yes, sir.

MR. PASSIN: Yes."

5.

Thus, Friedman was informed^{of} and understood the criminal object of the conspiracy and that the participation of more than one person was required. The follow-up question pointed out the distinction between his personal involvement with amphetamines and involvement by other members of the conspiracy. Although the plea minutes alone satisfy me that Friedman understood the charge, Irizarry v. United States, 508 F.2d 960, 964 (2d Cir. 1974), other factors reinforce this opinion. Friedman, at age 29, is a knowledgeable businessman with some college training; he has served as assistant comptroller of a large well known corporation, and chief accountant for a smaller one. After leaving these positions, Friedman purchased and operated a licensed medical and dental center in Spanish Harlem and leased and operated a second clinic.

Friedman's degree of sophistication, coupled with the inquiry conducted on the record, lead me to reject his claim of lack of understanding of the nature of the proceedings and of the charges.

Counsel next complains that Friedman was incorrectly informed at the time of plea that a special parole term of two years could be imposed when, in fact, a three year special parole term is required. The simple answer to this argument is that defense counsel erroneously states

6.

the proper sentence. For first offenders, a maximum sentence of five years and/or \$15,000 and a minimum special parole term of two years is provided, 21 U.S.C. § 841(b)(1)(B).

Although not directly raised in the moving papers, I note that Friedman was never informed that the special parole term of two years is the required minimum if a period of incarceration is imposed. While the word "minimum" was not used, I did inform Friedman that he "could go to jail for five years and pay a \$10,000 fine and two years special parole."

When the crime charged so dictates, a district court must determine whether a defendant who seeks to enter a guilty plea understands that he may be subject to a mandatory minimum special parole term, Michel, supra. To my knowledge, the Court of Appeals for this Circuit has applied this standard in but a few instances. In Michel, supra, which enunciated the rule, the court reviewed the plea minutes and concluded that the district court had properly advised the defendant concerning special parole. Thereafter, in Ferguson v. United States, 513 F.2d 1011 (2d Cir. 1975) a vacatur of a guilty plea was ordered where no mention whatsoever was made of a special parole term. A third case, Aviles v. United States, 405 F.Supp. 1374 (S.D.N.Y. 1975), aff'd 538 F.2d 307 (2d Cir. 1976), although

7.

not binding precedent,*/ is of analytical importance. Notwithstanding the omission of any reference to special parole in the course of the plea inquiry, the motion to vacate was denied. Two basic reasons supported this conclusion: first, the defendant executed an advise of rights form indicating that his attorney had advised him of all consequences of the plea, 405 F.2d 11375-76, and second, relying in part on a Fourth Circuit case, the district court ruled that since the term of imprisonment imposed, plus the special parole term, did not exceed the total of the maximum jail term plus the minimum parole term, the error was harmless, 405 F.Supp. at 1378-83 citing Bell v. United States, 521 F.2d 713, 714 (4th Cir.), cert. denied, 425 U.S. (1976).

The Friedman plea survives scrutiny under both standards espoused in Aviles. Privately retained counsel who represented the defendant at the time of plea has submitted an affirmation to this Court in which he indicates

*/ The Federal Reporter lists the case as a decision without a published opinion. A footnote to the listing of the affirmance reads as follows:

"Oral opinion delivered in open court in the belief that no jurisprudential purpose would be served by a written opinion. An oral opinion or a summary order is not citable as precedent. Local Rule § 0.23."

8.

that Friedman was a friend and client, that the plea of guilty was offered after consultation, and that Friedman "knew the full extent and consequences of his plea of guilty." Friedman has submitted no affidavit denying his understanding of the special parole term or any other consequence of his plea. Considering the attorney's statement, Friedman's level of sophistication and the absence of a denial of understanding, I conclude that when Friedman was informed on the record of the possible "two year special parole" he understood the full meaning of that reference.

Tangentially, I note that under the Bell harmless error test, the sum of the jail term imposed, three years, and the special parole term, three years, is less than the sum of the maximum jail term, five years, and the minimum special parole term, two years.

Defense counsel has neither briefed nor argued the procedural application of United States v. Journet, 544 F.2d 633 (2d Cir. 1976), to this plea inquiry. However, the government's answering papers assert that Journet, even if raised, would not control. Journet, which was decided four months prior to the taking of this plea, is novel and important in at least two respects: it requires first, that a defendant be advised that the "maximum possible penalty" includes possible life-time parole, 544 F.2d at 636

and second, that "unless the defendant is specifically informed of each and every element enunciated in Rule 11 the plea must be vacated." 544 F.2d at 634. Thus, the Court departed from its prior ruling that "[a] guilty plea will not be invalidated simply because of the district court's failure, during its Rule 11 inquiry, to enunciate one or more of the rights waived by the defendant."

Kloner v. United States, 535 F.2d 730, 733 (2d Cir. 1976).

Judge Pierce recently considered the retroactive application of Journet and concluded that under the standards set forth in Halliday v. United States, 394 U.S. 831, 832 (1969), for determining retroactivity of appellate interpretations of Rule 11, Journet should not be applied to previously accepted guilty pleas:

"The purpose and effect of Journet has been to mandate a specific procedure for the taking of guilty pleas in the future; reliance on the 'totality of the circumstances' approach was widespread, and it is abundantly clear that a retroactive application of Journet's 'each and every' standard would mandate the vacating of scores of guilty pleas entered in this court, many of which have been followed by the imposition of a prison sentence, and thus would have a substantial impact upon the administration of justice."

United States v. Saft, 76 Cr. 414 (Feb. 17, 1977).

I agree with the reasoning of Judge Pierce. The purposes of the Journet rule are to require strict adherence with Rule 11, to insure that a proper record is made

10.

of the defendant's understanding of his rights, and, lastly, to insure that the defendant is aware that life-time parole is a possible consequence of his plea. Yet the prior case law, which indicated that voluntariness should be viewed from all the circumstances, controlled not only motions to vacate but also the manner in which plea inquiries were conducted. In addition, the Journet requirement that under Rule 11(c)(1) the defendant must be informed of the maximum possible parole term is a substantial departure from past practices and possibly more generous than Rule 11(c)(1) requires. See 1974 Amendment, Notes on Advisory Committee on Rules. Thus, there has been substantial reliance upon pre-Journet law. Finally, as Judge Pierce noted, to give retroactive effect may be to void countless convictions in this district. Unlike the Michel decision which was given retroactive effect in Ferguson, Journet is not isolated to one facet of the plea inquiry; the breadth of Journet is itself a factor militating against retroactivity.

Viewing all the circumstances surrounding the plea, I continue in my belief that the plea of guilty was entered knowingly and voluntarily and had a basis in fact.

11.

II.

Friedman asserts that his plea of guilty should be vacated because he was ineffectively assisted by his privately retained trial counsel. Present counsel recognizes, as he must, that the standard in this Circuit is that the assistance rendered "must be of such a kind as to shock the Conscience of the Court and make the proceedings a farce and mockery of justice." United States v. Wight, 176 F.2d 376, 379 (2d Cir. 1949). Friedman argues that this standard has been satisfied, as evidenced by trial counsel's failure to adequately investigate possible defenses, failure to make pretrial motions, and failure to file a notice of appeal.

According to the government's version of the crime, Friedman was arrested after a "buy-bust" of his co-defendant by an undercover agent of the Drug Enforcement Administration. This arrest occurred in his apartment and Friedman was found to be in possession of 10,880 pills including Valium, Librium, Trianil, Elavinil, Demerol, Nycomine, Codenine, Fiorinal with Codeine, and Tenuate Dospan. Trial counsel indicates in his affirmation submitted on this motion that Friedman told him that he had invited the agents in and allowed them to search the premises. A motion to suppress, therefore, would have been futile.

12.

As to pretrial discovery, counsel was permitted to inspect the government's complete investigative file of the case, far more information than a defendant is entitled to obtain by law.

Post-plea admissions of guilt certainly do not waive an ineffective assistance claim, but they do reduce the likelihood that the most diligent and skillful counsel could have found a viable defense. Friedman has admitted his guilt in the pre-sentence investigation, at the time of sentence, and in his affidavit in support of his Rule 35 motion.

Finally, the assertion that trial counsel's lack of competence is indicated by his failure to file a notice of appeal from the judgment of conviction strikes me as ridiculous. At the time of plea, trial counsel stated on the record that he knew of no reason why the plea should not be accepted. Considering the joint decision by counsel and defendant to offer a guilty plea, I cannot fathom why trial counsel could have sought to appeal; present counsel has offered no suggestions.

The record demonstrates that Friedman was most adequately represented by his chosen counsel; his claim is, therefore, rejected.

III.

Friedman's final claim is that this Court lacked adequate and accurate information at the time of sentence. His memorandum of law contains the following summary of defects:

"1. Your petitioner was not involved in the sale of drugs for an extended period of time;

"2. Your petitioner was going through a very difficult period in his life financially and with respect to his marriage;

"3. Your petitioner was in no way a pathological liar or a financial manipulator."

As to the first claim, the pre-sentence investigation contains a one page summary of the defendant's version of the crime and a summary of the government's version of approximately equal length. The report does not attempt to resolve the differences in the two versions. At the time of sentence, Friedman reiterated his claim that the instant offense was a "one-shot situation." Since the defendant had a full opportunity to present his version of the offense, nothing more was required.

The same may be said of Friedman's financial and personal problems. While I consider it unnecessary to elaborate for the purposes of this motion, it suffices to say that the pre-sentence report explored in detail

14.

Friedman's marital and financial difficulties. Several sources were interviewed on each score. At the time of sentence, Friedman and his counsel emphasized much of the information contained in the report concerning his financial condition. The only claimed error raised prior to sentence was concerning Friedman's outstanding indebtedness to the government. As trial counsel noted, since the preparation of the pre-sentence report, Friedman took steps to reduce his debt to the government from \$12,000 to \$1,000. The government did not dispute this new information and it was given full consideration by this Court. Neither the affidavit in support of this motion nor the memorandum of law point to any other specific errors or inadequacies. Friedman's affidavit in support of the earlier Rule 35 motion did not seek to contradict the information in the report regarding his personal and financial condition but rather to give different shades of meaning to it; that affidavit was given consideration prior to the denial of the Rule 35 motion.

The third alleged defect in the report was that it inaccurately portrayed the defendant as a "pathological liar or a financial manipulator." Actually, the report quotes one individual as labelling Friedman as a "pathological liar;" the individual's identity and association with

15.

the defendant are disclosed in the report and the reader of the report can easily judge the motivation of the declarant in making that assessment. The defendant does not dispute that the description was actually used.

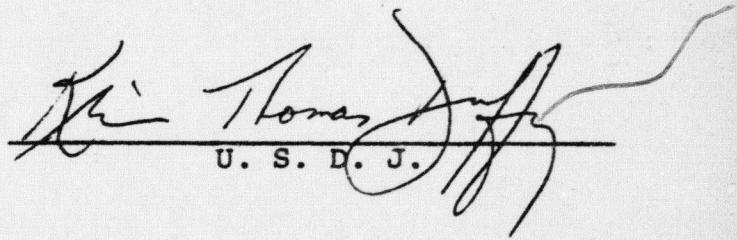
The "Evaluative Summary" states that the probation department's "overall impression of the defendant is that of a financial manipulator" That portion of the report which provides the details of financial arrangements is separate and apart from the evaluative portion. While the probation department's impression or evaluation is to be considered by the Court, it is merely an opinion and not a factual detail of the defendant's background.

Since trial counsel was given an adequate opportunity to examine the entire pre-sentence report, including the probation department's recommendation, to state his objections thereto, and to provide the defendant's version of the facts, nothing further was required of this Court. See United States v. Robin, Dkt. No. 76-1033 (2d Cir. Oct. 15, 1976).

The motion to vacate the judgment of conviction is denied. The motion will also be considered as an application pursuant to 28 U.S.C. § 2255; as such it is denied.

The pre-sentence report is ordered sealed and
made a part of the record.

SO ORDERED.


U. S. D. J.

Dated: New York, New York

May 19, 1977.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
UNITED STATES OF AMERICA,

-v-

GILBERT FRIEDMAN
-----x

76CR 441 KTD

NOTICE OF APPEAL

NOTICE is hereby given that defendant, Gilbert Friedman hereby appeals to the United States Court of Appeal for the Second Circuit from the order of the Honorable Kevin Thomas Duffy, D.J., dated the 19th day of May, 1977, denying said defendant's Motion for withdrawal of the plea of guilty pursuant to Rule 32 (d) of the Federal Rules of Criminal Procedure and 28 U.S.C. § 2255.

DATED: Queens, New York
June 1, 1977


WILLIAM L. FINGER
Attorney for the Defendant
125-10 Queens Boulevard
Kew Gardens, New York 11415
(212) 268-2400

TO: Honorable Robert B. Fiske
United States Attorney, S.D., N.Y.
U.S. Courthouse
One St. Andrew's Plaza
New York, New York 10007
(212) 791-0071

DEFENDANT'S ADDRESS:
Gilbert Friedman
P. O. Box 600
Elgin Airforce Base
Florida 32542

A-165

EXHIBIT

THE UNITED STATES OF
AMERICA

V.

GILBERT FRIEDMAN

AFFIDAVIT

1. I am the defendant-appellant in the above captioned action and make this affidavit in support of the appeal filed by my attorney, STEPHEN DAVID FINK.

Dated: September , 1977

GILBERT FRIEDMAN

Duly sworn to this 20th
day of September, 1977

Miller

N. tany

O. L. Miller, Case Manager
Authorized by the Act of July 7, 1955
to administer oaths (18 U.S.C. 4004)

Gilbert Friedman

Defendent's Exhibit "1"

Did you have pre-trial conferences with Mr. Passin? If so, how many, where and when?

Answer: My contact with Mr Passin was limited to the brief discussions we had prior to appearing before Judge Duffy. At no time were there any meetings outside of the courtroom. These discussions were related to what kind of sentence I would get, since Mr. Passin had recommended even before a Judge was assigned that I plead guilty. This was based on the supposition that the surrendering of the drugs that were in my apartment could not be suppressed as evidence. This was Mr. Passin's opinion, but he did not tell me how he came to this opinion.

Did Mr. Passin investigate the facts of the case ?

Answer: No. After my meeting with Mr. Passin, before my arraignment, we never discussed the case again, other than in a superficial manner. Mr. Passin never asked me about the case again. It was all related to his opinion that I would have to plead guilty.

Did Mr Passin interview or call witnesses?

Answer: No. I do not know why accept to reiterate Mr. Passin's opinion.

Did Mr Passin discuss the prosecution's case with you? When?
Did he suggest possible defences?

Answer: Mr. Passin never discussed the evidence the prosecution had accept for the evidence discussed above. There was never any discussion of a defense.

Where did you know Mr. Passin from? Did you know what his criminal experience was?

Answer: I have retained Mr. Passin on numerous occassions to handle legal matters pertaining to my business. He reviewed any contracts I was considering. I did not have any knowledge of his criminal experience. Being that this was my first encounter with the judicial system I entrusted Mr. Passin with these matters. I had no one else I could turn to.

Gilbert Friedman
 Defendant's Exhibit "1"

Describe in detail the circumstances surrounding your arrest? Did you in any manner invite the D.E.A. officers in?

Answer: I was arrested outside of my apartment building. I was about to go into my garage where I keep my car. My destination was one of my places of business. The agents informed me of my arrest and that " We will go get a search warrant and search your apartment. We can not be held responsible for any damage that is done." That includes stereos, furniture, etc. " Since we have Mr. Gassberg, we are sure we can get a search warrant. "

Specifically, what are the facts concerning your background that the pre-sentence report incorrectly notes.?

Answer; First and foremost, there is the issue of the extent of my drug activity. The basis for the statement in the pre-sentence report is a D.E.A. report which quotes the D.E.A. informant as saying, that I told him that I could get him 16,000- 20,000 barbiturate tablets per week. I deny the statement along with the fact that I ever spoke to this informant. Mr. Gassberg, my co-defendant, has repeatedly insisted that he and he alone met with the informant. It was Mr. Gassberg who made the statement that he could supply the agents with this quantity. It was also very unfortunate that Mr. Passin did not tell me of this statement. I did not know that my report included such a statement until Mr. David Fox informed me that such a damaging statement existed. Mr. Fox made this the primary issue in my initial Rule 35 motion, since I felt that this was one of the major reasons for Judge Duffy giving me, a first offender, a rather harsh sentence.

Since I have never personally read my pre-sentence report and I rely only on counsel's opinion, I can only say that the report is filled with inaccuracies and innuendos. The report was not adequately reviewed to me by Mr. Passin. Had I known then what I know, about this very important report, I never would have allowed my attorney to continue with sentencing.

Gilbert Friedman
Defendent's Exhibit "1" cont.

Did you discuss special parole?

Answer: After Judge Duffy sentenced me, Mr. Passin, Mr. Batchelder, the Assistant U.S. Attorney stood in front of the bench rather confused, because we did not understand the judge's orders. We asked that he return from his chambers and reiterate the sentence and also grant a stay in surrendering so I could put my affairs in order. We could not comprehend why the judge repeated himself in sentencing me to three years confinement. Only after did I find out that I was also given a three year special parole. Since I never heard mention of it before and Mr. Passin and I never discussed it even after seeing in my pleading minutes that the judge still mentioned it. I only read the pleading minutes after I was sentenced and in the consultation of Mr. David Fox. I specifically remember telling Mr. Fox that I never recalled the judge mentioning special parole. It was then that we ordered the pleading minutes. At no time did Mr. Passin and I ever discuss special parole. At the time of my plea, I never knew that I would be required to serve a special parole term.

AFFIDAVIT OF PERSONAL SERVICE

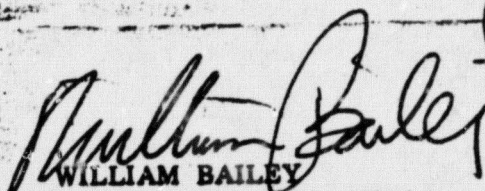
STATE OF NEW YORK
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 22 day of November, 1977 at No. 1 St. Andrews Place, NYC

deponent served the within Appendix
upon U.S. ATTORNEY

the Atty. for Appellee herein, by delivering a true copy ~~(xxx)~~ thereof to him personally. Deponent knew the person so served to be the person mentioned and described in said papers as the attorney for respondent therein.

Sworn to before me this
22 day of November 197 .

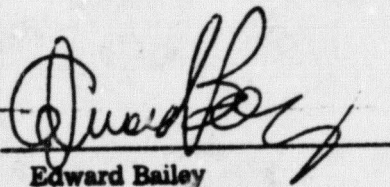

WILLIAM BAILEY

Notary Public, State of New York

No. 43-0132945

Qualified in Richmond County

Commission Expires March 30, 1978


Edward Bailey